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BY

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AND

C. E. A. BEDWELL, Esq.

"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῇ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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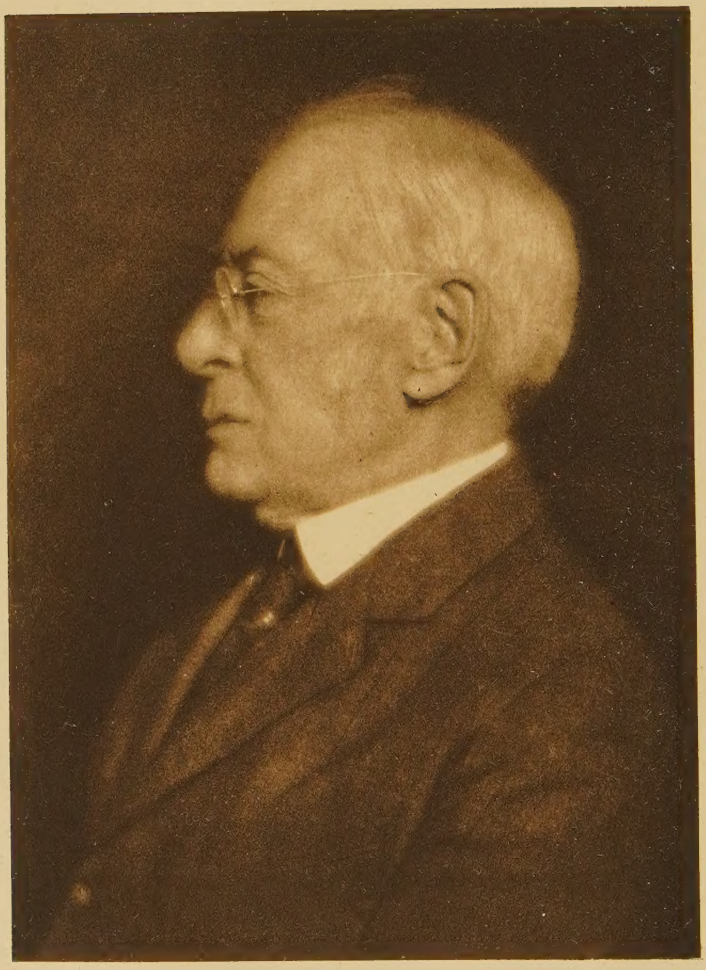

Emeritus President Eliot.

CHARLES WILLIAM ELIOT.

[There is no name which commands such general respect and affection in the United States of America, as that of Charles William Eliot. I regret that I am not permitted to disclose the authorship of the following appreciation. It is based on intimate knowledge, and may be trusted as giving an accurate presentation of the facts.

Ex-President Eliot has always taken a keen interest in the work of the Society of Comparative Legislation, and we have often been indebted to him for valuable help.—C. P. I.]

CHARLES WILLIAM ELIOT was born in Boston, Massachusetts, on March 20, 1834. The only son of Samuel Atkins Eliot and Mary Lyman, on both sides he was descended from families of prominence and distinction in the Commonwealth. His father was a successful merchant, and acted for many years as treasurer of Harvard College.

Eliot received his early education at the Boston Latin School and at Harvard College, where he graduated with high rank in 1853. From the first he was principally attracted by Mathematics and the Sciences, but the rigid classical curriculum of those days gave him little opportunity for advanced work in these subjects during his undergraduate career. After graduation he returned to Harvard as tutor in Mathematics, and afterwards was called as Assistant Professor to the newly founded Massachusetts Institute of Technology in Boston. It was during his tutorship that he rowed (together with the late Alexander Agassiz) in the first Harvard crew, and it was owing to the fact that he and his fellow oarsmen went into Hovey's store in Boston on the morning of the race and bought crimson handkerchiefs to bind about their foreheads that crimson was soon after adopted as the Harvard University colour.

The financial panic of 1857, and the subsequent death of his father, nearly ruined the family fortunes, and it was a high sense of duty to his mother and four sisters that prevented Eliot from joining his comrades in the Northern Armies during the Civil War of 1861–5. During this period and the immediately succeed-

ing years he spent his time in teaching and research and in the investigation of educational methods at home and abroad. On May 19, 1869, he became President of Harvard College.

It was only after a long and bitter contest that he was elected to the office which he was to hold with such unique distinction for the next forty years. Harvard was at that time a small, ultra-conservative New England college, with a narrowly prescribed classical course of instruction, and no graduate or professional schools worthy of the name. Eliot was a young man of thirty-five, whose educational views were generally regarded as dangerously radical, and it was many a long month before the more old-fashioned members of the Governing Boards could be brought to consent to his election. Their fears that changes would occur were amply justified by the event, though it was to be one of the happiest things in the new President's life that most of his early opponents were finally brought over to acknowledge the great benefits which his innovations had conferred. But in the early years of his administration he had to weather many a storm. On one occasion an offended dignitary arose in a full board meeting, and haughtily demanded the reason for the new measure. "It is very simple," came the quiet reply from the lips of the slim, erect figure at the head of the table. "You have a new President."

To give a full account of the work done by Eliot as President would be to tell the story of the most memorable forty years in the long life of Harvard, and to describe its transformation from a small New England college to a great university of international fame. Only a few of the most important developments can be noted here. In Harvard College proper (that is, the undergraduate portion of the University) Eliot's name will always be associated with the establishment of the so-called "elective system"—that is, the regime under which each undergraduate is left free to select his own courses of instruction, instead of the rigidly presented curriculum inherited from colonial times. This new development naturally encountered the bitter hostility of all the conservative elements in the University. It was enormously expensive, for it involved a great increase of the number and variety of the course offered, and consequently of the teaching staff; and it was more than twenty-five years before it could be thoroughly set up. It is probable that in some directions the change went somewhat too far, and at present the tendency is towards a modification of it, which promises ultimately to result in a system similar to that in

vogue in Oxford and Cambridge; but its severest critics to-day will readily admit that it laid the foundation on which all subsequent progress has been built. Yet the changes which Eliot brought about in Harvard College are only a small part of what he accomplished for the University as a whole. The extension and development of its graduate and professional schools was from the first a chief object of his administration. The Graduate Schools of Arts and Sciences, of Architecture, and of Business Administration owe their existence to him, and he did much to strengthen the Divinity School. But perhaps his most conspicuous triumphs were won in the growth and development of the Law and Medical Schools. Both these existed when he came into office in 1869, but they scarcely deserved the names they bore. The instruction was deficient, the examinations a farce, and there existed, in both faculties, a profound aversion to the acceptance of new methods or ideas. An intellectual revolution was accomplished in the Law School by the appointment of Professor Langdell, and the "case system" of instruction which he introduced. As developed by Professor Langdell and the remarkable series of eminent teachers by whom he was accompanied and followed, it has served to make the Harvard Law School a Mecca for students from the Old World as well as the New. In the Medical School the progress has perhaps been even more striking. Here the problem was primarily to encourage the study of new subjects, to stimulate research, and to provide the necessary laboratories and equipment therefor. It was well said of Professor Eliot, at the close of his forty years of office, that "not in its buildings alone, but also in the instruction and research within its walls, he found our Medical School brick, and left it marble."

Eliot's interests and activities have been by no means limited to his administration of Harvard University. During the latter years of his Presidency, and since his resignation, he has taken a keen interest in political, social, and economic problems, and on many occasions he has actively participated in their solution. Such participation has for the most part taken the form of articles and open letters, public speeches and committee work; and, as he has come to be more and more generally regarded as "America's first private citizen," his opinions have always been given great weight. He was, from the outset, an ardent supporter of the movement for Civil Service Reform. In all disputes between labour and capital he has consistently resisted compulsion and abridgement of liberty

in any form, whether from the side of the capitalists or of the trade unions; and he has laboured consistently in the cause of international peace.

In 1913, when he was seventy-nine years old, it was hoped that he would become Ambassador to the Court of St. James. The coming of the Great War, with the tremendous strain which it involved, made it fortunate perhaps that a younger and more active man was finally appointed, but Eliot's deep sympathy with England and all that the Allies have fought for has been abundantly demonstrated by his writings and speeches since the opening of the struggle.

Eliot's magnificent health has stood him in good stead, and now, in the middle of his eighty-seventh year, after a life of ceaseless activity, he retains to a remarkable degree the erect stature, clear enunciation, and splendid vigour of thought and action which have characterised his long career. He is a Puritan to the core, and a Puritan of the very best type—with simplicity, hard work, and a passion for truth and liberty as the guiding motives of his life. His intellectual capacity, particularly in organisation and administration, ranks very high, but most of those who have had the privilege of knowing him and working with him would probably testify that his success has been primarily due to his lofty character, his perfect fairness, and his ability to elicit the best from every one with whom he comes in contact. "I've never yet had a talk with him," said one of them, "without coming away encouraged, refreshed and inspired." When, on his retirement from the Presidency in 1909, he received the Harvard LL.D. at the hands of his successor, he was worthily characterised as "teacher, administrator, orator, prophet; forty years the leader and guide of Harvard, and in the single-minded elevation of his character a model to her sons; the father of the American University, the brother of all teachers and students, the friend of every lover of his country."

THE LAW OF ENGLAND AND AMERICA RELATING TO WAREHOUSE RECEIPTS.

[*Contributed by* PROFESSOR H. C. GUTTERIDGE, *Cassel Professor of Commercial and Industrial Law in the University of London.*]

THE movement towards uniformity of law appears to be making rapid progress in the United States of America, in so far as matters of commerce are concerned, and the day would seem to be approaching when commercial law will be uniform throughout the Republic. The Uniform Negotiable Instruments Act has been adopted by all the States with the solitary exception of Georgia, and this statute is closely followed in popularity by the Uniform Warehouse Receipts Act which has been enacted by all the States excepting Arizona, Indiana, Kentucky, Mississippi, New Hampshire, Oklahoma and South Carolina. Twenty-two States now have the Uniform Sale of Goods Act, and twenty-one States have adopted the Uniform Bills of Lading Act. The impatience with which men of business regard restrictions imposed by territorial limits is strikingly illustrated by the fact that, of the thirteen different uniform laws which were adopted by twenty-three States in the course of the year 1919, no less than eleven dealt with commercial matters.[1] Herein, one may also find proof, if any be needed, that the law merchant is still striving, as it has done throughout its history, to retain its quasi-international character.

The marked success which has attended the framing of a uniform law of Warehouse Receipts is a matter which would seem to entitle this measure to careful consideration by English men of business and lawyers. This result is probably due to the fact that vast quantities of produce are warehoused throughout North America, and that the goods are principally dealt in by way of the transfer of the receipts given to the depositors by the warehouseman, and that these receipts are utilised by the holders for the purpose of obtaining advances from their bankers. English commerce is chiefly sea-borne, and the functions performed in

[1] *The American Political Science Review*, vol. xiv, p. 458.

America by these receipts are largely fulfilled in England by bills of lading, but a stage is very often reached at which a document issued by a warehouseman comes into existence either in substitution for the bill of lading or as supplementary to it.[1] It would therefore seem that the matter is one of sufficient importance to merit an investigation of the rules laid down by the American law, and a comparison of those rules with the English law affecting those documents (other than bills of lading) which are included under the heading of documents of title to goods.

The success of the Uniform Warehouse Receipts Law also proves incidentally that American men of business possess in a high degree the power of influencing commercial legislation in the various States; and that, when a real demand exists for uniformity of law, machinery is available which is capable of attaining the desired end without undue delay or friction.[2]

Initiative of Business Men.—The refusal of the common law to attribute the quality of negotiability to these receipts had led to a certain amount of indiscriminate legislation by the various States prior to 1906, but the difficult problems involved had not been properly considered or thoroughly worked out, so that the statutes which had attempted to bring the law into harmony with the theory of commerce, in most cases, had failed to achieve their purpose. In the meantime the establishment of the Commission on Uniform State Laws had offered a way out of the difficulty by rendering it possible to bring the different States into line on such questions. The initiative seems to have been taken by the American Warehousemen's Association, with the active collaboration of the bankers and lawyers. The funds to meet the necessary expenses were easily found, and the Commissioners on Uniform State Laws were induced to entrust the drafting of a *projet de loi* to two well-known experts, Professor Williston of Harvard, and Mr. Barry Mohun, a practising lawyer and the author of the principal text-book on the subject. The draft as originally prepared was considered and discussed by all the business interests involved, and also by the Commercial Law Committee of the American Bar Association. A joint conference of all these bodies was held at New York, at which the draft was very fully discussed.

[1] Whether a dock warrant or delivery order displaces the bill of lading as the only symbol of goods *in transitu* is a difficult question. See Scrutton, *Charter Parties and Bills of Lading*, 9th Edition, p. 188, and Mr. A. T. Carter's article in *L.Q.R.*, vol. viii, p. 300.

[2] See *Journal of Comparative Legislation*, vol. xvi, p. 154.

Two thousand copies of the draft law were printed and distributed among commercial organisations, lawyers, judges, law teachers, and writers, inviting criticism and suggestions. The draft then came before the Commissioners on Uniform State Laws, the draftsmen reading it section by section and explaining its purport. The meeting of the Commissioners was attended by the President and Vice-President of the American Warehousemen's Association and the Counsel and Secretary of the Standing Law Committee of the American Bankers' Association. The draft was thoroughly discussed and finally adopted by the Commissioners on August 28, 1906.[1]

The result of this co-operation between the State and all other interests involved was to ensure that the Act, when adopted, would have the support both of those who were to be affected by its provisions and those who would be called on to administer them.

It is substantially correct to say that the law relating to warehouse receipts has become uniform throughout the United States and that a basis is now provided for a comparison of the laws of the two great English-speaking nations dealing with this complicated and important question.

In each case the parent stock of the law, as it now exists, was the common law of England; and in each case the common law has been substantially varied by legislation in order to make it conform to mercantile theory. But the process of evolution has been more complete in the United States than is the case in England.

English Common Law.—The common law of England consistently refused to recognise commercial documents of the class to which warehouse receipts belong (*e.g.* dock warrants, delivery orders, wharfingers' certificates and receipts, etc.[2]) as being in the nature of documents of title, or to regard them as symbolical of the goods they represent, as was the case with bills of lading. The Courts, in fact, construed them as being merely "tokens of authority to receive possession," and declined to allow either possession or property to pass by virtue of their transfer or negotiation.[3] This was not in harmony with the current mercantile theory that these documents were so completely identified with the goods which they represented that a transfer of the document

[1] *Reports of American Bar Association*, 1906, vol. xxx, Part II, p. 238.

[2] See Factors Act, 1889, s. 1 (4) for definition of documents of title, also s. 111 of the Stamp Act, 1891.

[3] *Blackburn on Sale*, 3rd Edition, p. 451; *Farina* v. *Home*, 16 M. & W. 119.

itself was sufficient to give property as well as possession to the holder. A long struggle ensued between the judges and the mercantile community, which ended in the triumph of the common law principle that these documents merely operated as authorities to receive the goods from the bailee, and that an attornment by the latter was necessary before any change of possession could be effected. The result, from the business point of view, was that persons taking these documents in the ordinary course of trade were liable to all outstanding claims or equities, and might find, in the end, that their bargain was worthless.

English Statute Law.—The legislature was accordingly set in motion to remedy this state of affairs, with the result that the law of England on the subject is now largely contained in certain intricate and sometimes obscure provisions of the Factors Act, 1889, and the Sale of Goods Act, 1893. In addition to this, there has also been a good deal of subsidiary legislation of a special character, dealing with warehouses situated in particular localities.[1]

The operation of the Factors Act and Sale of Goods Act is confined to certain special cases, and it is noteworthy that these are dealt with on the footing that the documents in question are documents of title. These special cases are: (1) Dispositions of documents of title made to purchasers for value in good faith by: (*a*) Mercantile agents in possession with the consent of the owner, (*b*) vendors remaining in possession subsequent to the sale, (*c*) vendees in possession with the consent of the vendor; and (2) the protection of a sub-vendee against the original vendor's rights of lien and stoppage *in transitu*. Apart from this the common law still holds good. The documents do not represent the goods, as in the case of a bill of lading, and as between immediate vendor and vendee it is still necessary (apart from custom) to have an attornment by the bailee in order to constitute a constructive delivery of the goods.[2] The transfer of a document of this nature by the original vendor to the buyer does not of itself pass the property in the goods; it may be necessary for the holder to perfect his title by obtaining actual or constructive possession. As regards the unpaid vendor's lien and right

[1] *E.g.* London and St. Katherine's Dock Act, 1864; the Legal Quays and Sufferance Wharf Acts, and various private Acts of Parliament, as to which see *L.Q.R.*, vol. viii, p. 300.

[2] As an instance of the difficulty which may be caused by this rule of law, see *Bentall* v. *Bunn*, 3 B. & C. 423, where the mere fact that a delivery order was given for the goods and accepted by the buyer was held not to be an acceptance of the goods themselves, and that, as there was no contract in writing, the seller had no remedy.

of stoppage *in transitu*, the operation of these statutes is confined to transactions in which the original buyer transfers the document to a third party, and the contest is between the original vendor and the third party, but the position as between the original parties to the contract of sale is apparently not affected. So that the principle of *nemo dat quod non habet* is not trenched upon, save to the extent indicated above. Another matter which may be alluded to here is that these statutes do not give any precise definition of a document of title, but include within that designation any "document used in the ordinary course of business as proof of the possession or control of goods, or authorising, or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented," thus often leaving it an open question whether any particular document satisfies the definition or not. Finally, except in the case of the dispositions which are subject to the provisions of the Factors Act, 1889, or where there is a trade custom to that effect,[1] these documents are not in any sense negotiable instruments entitling the holder to delivery of the goods or passing a better title to the holder than that outstanding in the endorser. A further exception is to be found in the case of certain of the special and private Acts of Parliament already mentioned, which give to the persons named in any such document or their endorsees the same right to possession and property as if the goods were lying in their own warehouses.[2]

The American Uniform Act.—The American Draft Uniform Act of 1906 has, as its main object, the recognition of a warehouse receipt as the symbol of the goods in respect of which it has been issued. It does not attempt to define a warehouse receipt, but provides that every receipt for goods lying in a warehouse shall contain certain specified particulars (s. 2). The most important of these is a statement of the charges in respect of which the warehouseman claims a lien. In the case of a negotiable receipt the warehouseman's lien is confined to charges so stated. The Act draws a distinction between receipts which are negotiable and those which are non-negotiable, and its provisions with regard to the latter class of receipt are, in effect, merely declaratory of the common law. As regards negotiable receipts, it introduces an important innovation. It makes the document

[1] Cf. *Dixon* v. *Bovill*, 3 Macq. H.L.1.; *Farmeloe* v. *Bain*, 1 C.P.D. 445; and *Merchant Banking Co.* v. *Phœnix Steel Co.*, 5 Ch. D. 205.

[2] See *L.Q.R.*, vol. viii, p. 302.

represent the original depositor's title to the goods, so that a person buying the document acquires not only the title of his immediate transferor but such property as the original depositor had in the goods (s. 41). But s. 40 excludes a thief or finder from the category of persons who are empowered to negotiate a receipt, so that the result is to make a negotiable warehouse receipt a quasi-negotiable instrument, the negotiation of which (except by a thief or finder) passes the right to possession of the goods, and is therefore tantamount to delivery of possession. Herein lies the main distinction between the English and the American Law. As has already been pointed out, the Factors Act only deals with the case of a sub-purchase, and as between original vendor and vendee a warehouse receipt is not apart from custom a negotiable instrument, entitling the latter by the mere fact of endorsement to demand delivery from the warehouseman. Further, where the document is negotiated by a holder who is not the owner to a purchaser for value in good faith, the transaction, as we have seen, is only protected by the Factors Act and the Sale of Goods Act in the three cases already mentioned, viz.: a disposition (*a*) by a mercantile agent, (*b*) by a vendor in possession, and (*c*) a vendee who has obtained possession. Thus, a disposition to a purchaser for value in good faith by a person who does not come under any of these headings will not be protected by the English law, though the American law would appear to do so.[1]

In the case of non-negotiable receipts, and negotiable receipts handed over but not endorsed, the common law rule that the document only amounts to evidence of the contract of bailment is preserved by s. 42 of the Uniform Act. By s. 49 the mere issue of a negotiable receipt defeats the unpaid vendor's lien and right of stoppage *in transitu* in all cases, a provision which seems to be in advance of the English law.

A valuable provision is that contained in s. 6, which prohibits the issue of receipts in sets without the duplicates being plainly marked, thus rendering it difficult to perpetrate the kind of fraud which gave rise to the case of *Barber* v. *Meyerstein*.[2]

S. 48 reproduces the principle of s. 25 (1) of the English Sale of Goods Act, 1893, and protects purchasers for value in good faith of negotiable receipts, the goods represented by which have

[1] *Cf.* sections 40 and 47 of the American Draft Uniform Law, and *Lamb* v. *Attenborough*, 31 L.J.Q.B. 41; *Oppenheimer* v. *Attenborough* [1908] 1 K.B. 221 at p. 226; *Cole* v. *North-Western Bank*, L.R. 10, C.P. 354.

[2] L.R., 4 H.L., 317.

already been sold, mortgaged, or pledged, but not delivered to the previous buyer by the vendor. It provides that in such cases the previous buyer shall be deemed to have expressly authorised the subsequent negotiation by leaving the negotiable receipt in the hands of the vendor. The rights of *bona fide* holders for value of negotiable receipts are further protected by s. 11, which makes the warehouseman responsible in all cases in which he delivers the goods, otherwise than in compliance with the terms of a negotiable receipt. As regards the mode and consequences of negotiation, the rules relating to the negotiation of bills of exchange are applied, *mutatis mutandis*, to negotiable receipts, but an endorser is safeguarded against any failure on the part of the warehouseman or a previous endorser to fulfil their respective liabilities.

S. 17, by allowing interpleader in cases of rival claims to goods, brings the American law on this point into line with the English law.[1] By s. 25, attachment or levy of execution on goods for which a negotiable receipt has been issued is prohibited, unless the negotiation of the receipt has been enjoined or the receipt itself is surrendered to the warehouseman. This also affords a very valuable protection to the purchaser of a negotiable receipt. Generally the Uniform Act also defines the liability of a warehouseman for misdelivery or want of care of the goods, and lays down rules for the exercise of his lien. S. 34 gives the warehouseman a power to sell or destroy perishable or hazardous goods which the owner refuses to remove after notice. Severe penalties are imposed on warehousemen issuing bogus or fraudulent receipts or issuing duplicate receipts not so marked. It is also made a criminal offence for a warehouseman to deliver goods for which a negotiable receipt is outstanding, without obtaining possession of the receipt.

An interesting provision is that which allows the warehouseman to mix "fungible" goods, which are defined as goods of which any unit is from its nature, or by mercantile custom, treated as the equivalent of any other unit (s. 58). This differs from the English law, which renders a bailee liable for intermixture unless the substances are similar in kind and quality and have become mixed by accident, or the act of God, or by the interference of a third party.[2]

The rules of law and equity including the law merchant are pre-

[1] See R.S.C. Order, lvii., rule 3, re-enacting s. 12 of the Common Law Procedure Act, 1860, which did away with the decision in *Crawshay* v. *Thornton*, 2 Myl. & Cr. 1.

[2] *Colwell* v. *Rees*, 2 Camp. per Lord Ellenborough, at p. 576; *Buckley* v. *Gross*, 3 B. & S. 566, per Blackburn J, at p. 575.

served in any case not covered by the Uniform Act (s. 56), and it is provided that the Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it.

So far as it is possible to test the matter, the Uniform Act does not appear to have given rise to difficult points of construction, and it would seem to have reduced the output of case law relating to the subject.[1] In fact, the measure appears to be a very sound and useful piece of commercial legislation, calculated to facilitate the transaction of business by presenting the main principles of the law in a compact and accessible form to those whose interest it is to know them. Speaking generally, the English and American law are brought into line as regards this topic, in the sense that their final operation is substantially the same[2]; though the protection given to purchasers of negotiable receipts is much more extensive in the case of the American Uniform Act than in the case of the English law, and the rights and liabilities of the warehouseman are more clearly defined by the American law. Whether the volume of business in England in connection with documents of title other than bills of lading is sufficient to call for a codification and reform of our law relating to these matters is a question which primarily concerns the business community. It is, however, a fact that the present code contained in the Factors Act and Sale of Goods Act is pregnant with difficulties, and that from this point of view alone a simplification and collation of the existing English law relating to these documents of title to goods would no doubt be welcomed both by men of business and lawyers.

[1] The cases are given in an annotation of the Act contained in the volume of Uniform State Laws in the United States by Charles Thaddeus Terry, published under the auspices of the National Conference of Commissioners on Uniform State Laws (New York: Baker Voorkis & Co.).

[2] As the result of the Factors' Act, the Sale of Goods Act, and the various other Acts of Parliament referred to at p. 8 *ante*, and the operation of mercantile custom a warehouse receipt is in a great many instances a quasi-negotiable instrument in England as well as in the United States. But, owing to the patchwork nature of English legislation on the subject, each case must be considered individually, and it seems that many of the so-called "documents of title" are not recognised by London merchants and bankers as such. (Scrutton: *Charter Parties and Bills of Lading* 9th Edition, p. 188.)

THE LEGAL STATUS OF ILLEGITIMATES IN THE COMMONWEALTH OF AUSTRALIA.[1]

THE purpose of this article is to show in what manner and to what extent legislation in the Commonwealth has alleviated the harshness with which illegitimate children were treated by the Common Law. For this purpose the subject will be treated under five heads :

(1) Legitimation ; (2) The right to inherit ; (3) Maintenance (including the establishment of paternity) ; (4) Government Bodies and Institutions ; (5) Compensation.

The Commonwealth Constitution Act (63 & 64 Vic. c. 12) empowers the Commonwealth Parliament to make laws with respect to " Marriage " and " Divorce and Matrimonial Causes, and in relation thereto, parental rights and the custody and guardianship of infants " (s. 51, xxi. and xxii.). Otherwise its powers hardly extend into the sphere now being considered, the matter being left in the hands of the States. There are, however, a few cases in which Commonwealth legislation touches upon the position of illegitimate children. These, being mainly in regard to compensation, will be dealt with under that head.

For purposes of citation it will here be convenient to set out a list of statutes referred to later.

The Commonwealth.—The Maternity Allowance Act, 1912 ; The Seamen's Compensation Act, 1911 ; The War Pensions Act, 1916 ; The Australian Soldiers Repatriation Act, 1917 ; The Service and Execution of Process Act, 1901–1918.

Victoria.—The Marriage Act, 1915 ; The Infant Life Protection Act, 1915 ; The Crimes Act, 1915 ; The Registration of Births, Deaths, and Marriages Act, 1915 ; The Worker's Compensation Act, 1915, s. 3.

New South Wales.—The Legitimation Act, 1902 ; The State Children's Relief Act, 1901 ; The Infant Life Protection Act, 1904 ;

[1] Contributed by students of the Law School in the University of Melbourne (Miss L. M. Henderson and Messrs. H. E. Williams, C. L. Hudson, E. F. Jones, and C. W. W. Webster).

The Interstate Destitute Persons Relief Act, 1919; The Worker's Compensation Act, 1916.

South Australia.—The Destitute Persons Act, 1881; The Administration and Probate Act, 1904; The State Children's Act, 1895; The Legitimation Act, 1898—Legitimation Amendment Act, 1902; The Affiliation Law Amendment Act, 1898; The State Children Amendment Act, 1900, 1903, 1909; The Workmen's Compensation Act, 1911.

Queensland.—The Deserted Wives and Children's Act, 1845 and 1850; The Legitimation Act, 1899; The Infant Life Protection Act, 1905; The State Children's Act, 1911; The Worker's Compensation Act, 1916–1918.

Western Australia.—The Deserted and Destitute Persons Ordinance, 1845; The Bastardy Laws Act, 1875; The Adoption of Children Act, 1896; The State Children's Act, 1907; The Legitimation Act, 1909; The Interstate Destitute Persons Relief Act, 1912; The Worker's Compensation Act, 1912.

Tasmania.—The Registration of Births and Deaths Act, 1895; The Deserted Wives and Neglected Children's Act, 1898; The Legitimation Act, 1905; The Infant Life Protection Act, 1907; The Notification of Births Act, 1910; The Hobart Children's Aid Association Incorporation Act, 1912; The Testators Family Maintenance Act, 1916; The Children of State Act, 1919; The Worker's Compensation Act, 1918.

Legitimation.—Legitimation by subsequent intermarriage is provided for by the laws of all States provided that at the time of the birth there was no legal impediment to the marriage. (Victoria—Regr. of Births, etc., Act, 1915; New South Wales—Legitimation Act, 1902; South Australia—Legitimation Act, 1898; Tasmania—Legitimation Act, 1905; Queensland—Legitimation Act, 1899). Western Australia is an exception in that, although its Legitimation Act, 1909, is based on the New South Wales Act, there is nothing in it corresponding with s. 6 of the New South Wales Act, which provides that the Act shall have no legitimating effect if there was a legal impediment to the marriage at the time of the birth.

To effect legitimation the marriage must be followed by a registration of the child by the father in Victoria (s. 26, ii., iii., and iv.), New South Wales (s. 7), South Australia (s. 5, and Amendment Act, 1902, s. 2), Western Australia (s. 6), Queensland (s. 3), Tasmania (s. 5).

In a majority of the States such registration can be made at any

time after the marriage, although it must be noted that the registration must be at some time during the life of the father, as a declaration by him is necessary. In South Australia, by the Legitimation Amendment Act, 1902, s. 2, and Schedule, it is provided that the registration may be made within thirty days before the marriage on proof on oath that the parties to be married are the parents.

The provisions of the legislation are retrospective, applying to marriages of the parents of illegitimates before as well as after the dates of the several acts—Victoria, s. 27 ; New South Wales, s. 3 ; South Australia, s. 2 ; Queensland, s. 3 ; Western Australia, s. 3 ; Tasmania, s. 2.

The provisions apply in favour of a child who has died before the marriage, so that for purposes of succession they are treated as having been born in wedlock—Victoria, ss. 27–8 ; New South Wales, s. 4 ; South Australia, s. 3 ; Western Australia, s. 4 ; Queensland, s. 4 ; Tasmania, s. 3.

The Right to Inherit.—(*a*) Of children legitimated by the subsequent intermarriage of their parents, (*b*) of illegitimate children not so legitimated.

(*a*) Rights of Succession are given to children so legitimated by the legislation of all States. That is to say that an illegitimate child thus legitimated shall have all rights of inheritance as regards real and personal property as though it were born in wedlock. The death of an illegitimate child before the subsequent intermarriage of its parents will not debar its issue from taking real and personal property by operation of law, if the parents have in fact intermarried. This is provided for in Victoria by the Registration of Births, etc. Act, 1915, ss. 27 and 28. But a limitation on its extra-territorial recognition is indicated by the judgment of Cussen J., in a case in which the Victorian Court was asked to recognise a similar provision of New York law (*Trustees, Executors, and Agency Co., Ltd.*, v. *Johnson*, 1919, V.L.R., 81). "The status of legitimacy retrospectively conferred by the law of the State of New York upon illegitimate children, whose parents have subsequently intermarried, cannot be recognised in Victoria as bringing such children within the terms of the Statute of Distributions as a 'brother's child' or 'brother's representatives' for purposes of an intestate's estate in Victoria, where the law did not come into operation during the lifetime of the parents, or at all events of the father of the children, though it was in operation at the death of the intestate."

The same general rights are provided for in New South Wales

by the Legitimation Act, 1902, s. 3, South Australia Legitimation Act, 1898, s. 2; Western Australia Legitimation Act, 1909, s. 3; Queensland Legitimation Act, 1899, s. 4; Tasmania Legitimation Act, 1905, s. 2.

By s. 29 of the Victorian Act it is provided that nothing in this Act shall affect any estate, right or interest to which any person has become entitled by virtue of any disposition made before the passing of the act or by virtue of any devolution by law on death of any person dying before the Act. The same provision is made by s. 5 of the New South Wales Act, Western Australia s. 5, Tasmania ss. 3 and 4, Queensland s. 5.

In South Australia there are apparently no provisions in respect to the devolution of property before the passing of the Act, in which case, the Acts being retrospective, it is a doubtful question as to what rights legitimated children would have in respect to any disposition or devolution before the passing of the Act.

(*b*) As yet the legislation in the Commonwealth has taken no steps toward giving to the illegitimate the right to inherit from the mother as has been done in some European countries.

Maintenance.—In general the provisions regarding maintenance of illegitimate children are common to all States, although they differ in some minor points, such as the amount payable for various expenses. The father may be made responsible for the confinement expenses—expenses incidental to child-birth and clothes for two months—by an order of the justices. Any single woman with child may take proceedings against the putative father in order that he shall make adequate provision for preliminary expenses. Evidence is to be produced by her to establish paternity of the child, and must be more than the oath of the mother. When the Court is determining these questions, it may order certain specific persons only to remain in Court. If before the date fixed in the order the child is not born the order lapses. The Court may also order the father to enter into recognisance, to appear on a date fixed by the Court to decide further maintenance, the recognisance to be forfeited if the defendant fails to appear. Where a father intends to leave or leaves his illegitimate child without adequate means of support, he may be summoned to show cause why he should not support it, and if an order for maintenance has been made, he must find surety that he will pay an allowance as directed. Failure to comply with an order is punished by imprisonment.

These provisions are in Victoria contained in the Marriage Act,

1915, ss. 101–109. By s. 89 it is provided that where the mother can wholly or in part contribute to the child's support, the justice may direct that she as well as the father or she alone shall so contribute. S. 74 gives the custody of the child to the mother until sixteen years of age, unless removed by an order of the Supreme Court. The maximum amount to be paid for confinement expenses in Victoria is £20.

In New South Wales the main provisions are in the Infant Life Protection Act, 1904, pt. ii. s. 4–23. By s. 5 (iii.), no order will be made if the Court is satisfied that the mother is a common prostitute. By s. 8 the mother may be apprehended if she leaves the child unsupported. S. 4 makes the age to which the child is to be maintained fourteen years in the case of a male and sixteen in that of a female, with a proviso that the Court may extend the period for the maintenance of a male to sixteen years. S. 18 makes the penalty for non-compliance with an order a fine not exceeding £50 or committal of the offender until he does pay. By s. 11 the putative father may be ordered to pay the funeral expenses of the mother or child.

In South Australia the provisions regarding maintenance are mainly contained in the State Children's Act, 1898, the State Children's Amendment Act, 1900, 1903, and 1909, and the Affiliation Law Amendment Act, 1898. In this State a State Children's Council has been set up, empowered to deal with maintenance, education, and welfare of neglected children, which includes illegitimate children. This will be dealt with later under the heading of Government Bodies and Institutions. Here, only legislation regarding maintenance in which the council plays no part is dealt with. In the Affiliation Law Amendment Act, 1898, ss. 2, 3 and 5 correspond with ss. 101–9 of the Victorian Act. The State Children's Amendment Act, s. 27, corresponds with s. 18 of the New South Wales Act.

In Queensland the Deserted Wives and Children's Act, 1840 and 1850, ss. 1, 2, 7 and 8, corresponds with ss. 85, 89, 104–109 of the Victorian Act. The State Children's Act, 1911, ss. 50–53, makes the father and mother both liable for the maintenance of an illegitimate child with a proviso that the father shall not be liable, if at the time the child was begotten the mother was a common prostitute. Ss. 16 and 17 of the Infants' Life Protection Act, 1905, correspond with ss. 101–5 of the Victorian Act.

In Western Australia the provisions are contained in the Bastardy Laws Act, 1875, ss. 4–15, Deserted and Destitute Persons

Ordinance, 1845, s. 8. S. 10 of the Bastardy Laws Act, 1875, corresponds with s. 14 of the New South Wales Act, and s. 12 has the same force as s. 89 of the Victorian Act.

In Tasmania the main provisions are contained in the Infant Life Protection Act, 1907, which is modelled on the New South Wales Infant Life Protection Act, 1904, and has the same effect. Special and particular provisions are found in the Testator's Family Maintenance Act, 1916, s. 3, which provides for maintenance of illegitimate children after the death of the father if an order for maintenance was made against him before death, and if (s. 5) the testator dies unmarried, and without being married.

The (Commonwealth) Service and Execution of Process Act, 1901–1918, ss. 15–18, provides for the service throughout the Commonwealth of a summons or execution of a warrant against any man in connection with the Maintenance laws of the respective states.

Government Bodies and Institutions.—In all the States, except South Australia, the Government institutions for the care of children only take charge of illegitimate children, when they can be classed as " neglected children " within the meaning of the various Acts for their welfare.

In South Australia, however, there is a system by which a Government Body not only cares for illegitimate children, but also by virtue of powers bestowed upon it by the Legislature enforces the payment of maintenance by the parents to that body while the child is in their charge. Illegitimate children whose parents will not or cannot maintain them are put on the same footing as neglected children, and are put under the control of the State Children's Council. All children under the control of the Council are called State Children. Thus by the State Children's Act, 1895, s. 6, the Act sets up an honorary council of five to twelve persons (s. 7) to be a body corporate, capable of holding and dealing with real and personal property, s. 8, its members to be appointed by the Governor, and s. 16 to have the following general powers: (1) The care, management, and control of the persons and property of all state children; (2) The power to apprentice or place out State children; (3) Power, subject to the Governor's approval, to appoint institutes for the reception, education or reformation of State children; (4) Power to grant licences for lying-in houses.

S. 9 provides for an annual report to the Governor to be laid before Parliament. By the State Children's Amendment Act,

1903, s. 6, maintenance proceedings may be instituted against any person concerning whom an officer of the Council shall make oath before a magistrate that he believes such person to be the father of any child born or unborn, even if the person has left the state before the birth of the child; provided that no such proceedings shall be taken unless authorised by the council.

By the State Children's Amendment Act, 1900, s. 11, where money is recovered before birth, it shall be paid to the State Children's Council to be kept till birth. Failing birth within nine months of the date of the order, the Council shall return the money to the alleged father. S. 31 provides that where any person is liable to contribute to confinement expenses or to the maintenance of any illegitimate child, the Council may accept from such person a sum of money in settlement of all such liability, whereupon the person shall be free of all further liability.

By the State Children's Amendment Act, 1909, ss. 18–26, the homes of illegitimate children under the age of seven shall be open to inspection by an officer of the Council (penalty not exceeding £20).

S. 29 of the same Act provides that on complaint, regarding maintenance, alleging a certain person to be the father, the justices may adjudge him to be the father on the mother's evidence alone (unless the defendant denies paternity) but not if the justices are satisfied that at the time the child was begotten the mother was a common prostitute. If the defendant denies paternity the mother's evidence must be corroborated in some material particular.[1]

By s. 12, during the hearing of an affiliation case, the justice or magistrate may order out of Court all persons save those directly interested in the case.

Compensation.—Legislation in all the states in providing for compensation for workers has been careful to include in the term "dependents" the worker's illegitimate children and grandchildren dependent on his earnings at his death; also the parents or grandparents so dependent of whom the worker is the illegitimate issue.[2]

[1] In South Australia there is a provision that if any person in affiliation proceedings gives evidence that he has had connection with the mother, the order made may direct that he shall contribute to maintenance.

[2] Victoria Worker's Compensation Act, 1915, s. 3; N.S.W. Worker's Compensation Act, 1916, s. 4; S.A. Workmen's Compensation Act, 1911, s. 4; W.A. Worker's Compensation Act, 1912, s. 4; Queensland Worker's Compensation Act, 1916–18, s. 3; Tasmania Worker's Compensation Act, 1918, s. 4.

Commonwealth Legislation.—In the Commonwealth legislation there are three statutes which are relevant to the subject.

The Maternity Allowance Act, 1912, s. 4, grants a bonus of £5 to every woman who gives birth to a child. There is no limitation to the case of married women.

The Seamen's Compensation Act, 1911, puts the same interpretation on the term " dependents " as do the Worker's Compensation Acts of the State Legislature.

The War Pensions Act, 1916, and the Australian Soldiers Repatriation Act, 1917—the purpose of which is sufficiently indicated by their titles—extend the benefits of the Act to adopted and " ex-nuptial " children of killed or incapacitated soldiers. In the former Act, where grandchildren are entitled to benefits, the ex-nuptial child of a son or daughter is included (s. 3). Where a son or grandson was killed or incapacitated his " ex-nuptial " birth is no bar to parent or grandparent benefiting under the Act. But in the Australian Soldiers Repatriation Act, the benefits provided for mothers apply only where the mother is a widow or her husband is incapacitated, and a similar provision is found in the War Service Homes Act, 1918.

[In connection with this study, reference may be made to a report published by the Children's Bureau of the Department of Labour dealing with the illegitimacy laws of the United States, France, Germany and Switzerland. Professor Freund contributes an analysis of the law of the United States. In the *Journal of the American Institute of Criminal Law and Criminology* (August, 1920) there was a detailed examination of the Swedish law on the subject.—Ed.]

AMERICA AND THE LEAGUE OF NATIONS.

[*Contributed by* George Wharton Pepper, Esq., of the Philadelphia Bar.]

There is only one way to assure the world of peace : that is, by making it so dangerous to break the peace that no other nation will have the audacity to attempt it.

In these words President Wilson expresses the ideal of which the League of Nations is the embodiment. The ideal is Force so applied as to attain a righteous end.

All the machinery of the League was carefully planned to give effect to this ideal. If the machinery is to be used as an agency of coercion, the mechanism will be seen at its best. If it is diverted from its purpose and used as a medium of conciliation, it will be seen at its worst. The method to be pursued when conciliation is the end in view must differ as widely from the processes of force as friendly conference differs from hostile coercion.

If ever the international situation appealed for clear thinking and consistent devotion to fundamental principle, such an appeal is ringing in our ears to-day. National responsibility for a prompt and definite answer to this appeal is so great that over-statement is almost impossible.

This paper is an attempt to identify the principle which should control the action of nations in discharging their international responsibilities. The attempt can best be made by asking a single question, and by insisting that it be answered.

Is the preservation of world order by coercion a worthy ideal, and, if worthy, is it presently attainable ?

An answer to this question is demanded in the interest of doing something definite for the world and doing it quickly. The question is intensely practical. An answer to it necessarily becomes the chart by which to steer. If the answer is affirmative, then all League amendments should be such as tend to ensure and facilitate quick and effective executive action. If the answer is negative, the necessary conclusion will be that what the Covenant of the League needs is not amendment but transformation.

As the question is a challenge to the idealism of Coercion it at once suggests a contrast with the idealism of Conciliation. "Coercion or nothing" is not a correct statement of the problem of organising the world for peace. It is not, and never has been, *this* League or nothing. It is this League or one that differs from it both in aim and method. Understanding of both alternatives is essential to a wise choice.

Coercion means insistence upon order at all costs. Conciliation concerns itself rather with the causes of disorder. Coercion pledges allies to unite in threatening direful consequences if peace is disturbed, and in executing the threat if it is disregarded. Conciliation demands organised opportunity for the processes of conference and peaceful arbitrament, while leaving each nation absolutely free to determine its course if conference and arbitrament fail.

The only justification of coercion is success. In national life nothing is more destructive of character than an important law that is not adequately enforced. In international life nothing more effectually impedes civilisation than reliance upon a coercive force which proves inadequate when invoked. If force and civilisation are thought of as inter-dependent, the collapse of one will inevitably involve the other.

Whether success is a sufficient justification for the use of force is a question upon which there will always be a difference of opinion. There are those who insist that coercion is always and under all conditions unworthy. There are others, a great majority, who hold that force is given us to be used, and that it cannot be better used than to ensure the triumph of a righteous cause. But, whatever differences of opinion there are respecting the justification for the effective use of force, there can be no such divergence of view when either the threat of force is insincere or the force is not available. To attempt to keep world peace by insincere promises of force or by sincere promises of a force which cannot be mustered is merely to select sand as the foundation of an international structure.

The value of conference as an agency of conciliation may be expressed in the statement that, while it may perfectly succeed, it can never altogether fail. A favourite argument for resort to international coercion is the alleged failure of The Hague Conference. It must never be forgotten that The Hague Conference resulted from the efforts of a few far-seeing people to impose upon the world an institution of the need of which the world was not aware. It was like an offer of salvation to people unconvinced of sin. To-day

every nation is oppressed by a sense of need. If international coercion is certain to fail, organised international conference will now have its maximum chance for complete success.

But, in fact, it is not true that The Hague Conference has failed. Apart from its definite accomplishment is the fact that it has kept alive the ideal of conference to which the world may turn when the futility of force as a guarantor of world peace is fully realised.

Whatever may be one's estimate of the value of The Hague Conference, all should concede that a far different future can be predicted for a league of nations organised for conciliation and wholeheartedly committed to the method of conference, without appeal to force. It is such an organisation that the moral influence of a peace-loving nation can be exerted with maximum effect. The atmosphere of such a League is congenial to the peaceful determination by judicial decision of all disputes suitable for reference to a Court, and to the free discussion of all international differences not suitable for reference to a Court, but bound to lead to war unless adjusted.

Such is the contrast between coercion and conciliation. All are agreed that conciliation, as an ideal to be striven for, is worthy. Respecting the worthiness of coercion, opinion is divided. But again there is unanimity upon the proposition that a coercive alliance based upon unavailable force has in it nothing but the promise of disaster. The question accordingly recurs whether it is actually feasible so to organise international force as to make nations afraid to go to war ?

If adequate international force is to be available, it must be either through the agency of a standing international army or police force at the disposal of the alliance or through the united response of member States to the appeal of a central Council. An alliance with an adequate force at its disposal is necessarily a super-State. An alliance which depends for its force upon the response of member States is in effect a super-State if they respond, and an impotent failure if they do not.

No one who advocates a standing international army to-day will have a sympathetic hearing. If international force is to be available for coercive purposes, it must be through economic pressure and through quotas of money, men and ships contributed in compliance with a solemn promise to supply them. The test of the availability of such a force would arise in case member States were in disagreement respecting the merits of the dispute in which they were summoned to intervene. If a promise to supply force were weighed

against a conviction that the force is to be misapplied it would make little difference which way the scale tipped. There is small choice between a broken covenant and an unjust war. If the people of a member State were themselves divided in opinion upon the merits of the dispute between two other States, the test would be even more severe. The United States of America is itself a League of many nations. Every European dispute presents issues which tend to array one racial group against another. Even when the issue was as plain as in the case of Germany's aggression it was a long while before American force could be made available. It will be a long while before such a one-sided question will again confront the world. Most international disputes disclose merit on both sides. To expect neutral States with homogeneous populations to be willing to coerce one side or the other is to expect much. To propose such a course to a nation in large part made up of the blood-brothers of both disputants is to propose the impossible. Whatever may be the European view upon this subject, the ideal of order through coercion is one likely to be viewed throughout the entire Western Hemisphere not only as unattainable, but as positively mischievous.

The simple fact is that the time has come for each nation definitely to declare its faith. Shall it stand for allied coercion as the guarantee of world peace? Shall it reject such a proposal and substitute nothing in its room? Or shall it come out boldly with a declaration that the hope of civilisation rests in organised international conference and the moral force which it will engender?

The people of the United States have definitely repudiated the first of these three proposals. On the eve of the November election President Wilson delivered what was in effect a charge to the jury of the American people. His charge contained the sentence with which this paper begins. Elsewhere in his charge he used the following language:

> No one who opposes the ratification of the Treaty of Versailles and the adoption of the Covenant of the League of Nations has proposed any other adequate means of bringing about settled peace. There is no other available or possible means, and this means is ready to hand.

Having explained to the jury that prompt and unconditional acceptance of the Covenant was the great obligation of the hour, he concluded as follows:

> I suggest that the candidacy of every candidate, for whatever office,

be tested by this question: Shall we or shall we not redeem the great moral obligation of the United States?

The jury, without leaving the box, promptly returned a decisive verdict adverse to every candidate who had committed himself to the views thus expressed by the President.

It may, therefore, be asserted with confidence that, so long as the League of Nations retains the form of an alliance to preserve order by threats of coercion the United States of America will deem it unwise to become a member.

The only issue which now awaits determination in the United States is the issue suggested by the last two of the three questions specified above. Two things may safely be affirmed. One is that the great majority of people in the United States are eager for the organisation of a League of Nations which the United States can join. The other is that the United States will join the League if and when it is transformed into a league to promote peace through processes tending to conciliation.

The features which distinguish a coercive alliance from an organisation for conference and conciliation are five in number.

1. Limited as opposed to inclusive membership.

2. An Executive Council representing powerful States and armed with authority to pass judgment, as distinguished from a standing council of conciliation without power either to decide disputes or to bind member States by its action.

3. An assembly of nations to act as a check upon the powers given to the executive cabinet.

4. A subordination of all judicial machinery to the power and will of the Executive, as distinguished from the supremacy of the judiciary in all matters suitable for the cognisance of a Court.

5. A pledge of force to resist aggression or to enforce the policies of the League, as distinguished from the absolute freedom of every member State to determine its own course if and when conference has failed.

1. Membership in an alliance for coercion is necessarily limited to those States which conceive of themselves as the civilised and peace-loving nations of the world. Other States can be admitted to the alliance only when their conduct is such as to be a guaranty of conformity to the views of the majority. Such an organisation is essentially aristocratic. Its very presence in the world makes bad feeling. If it succeeds in keeping order it does so by inspiring fear, not by stimulating brotherhood. On the other hand, the charter

members of an association for conference will be the very nations most likely to cause disorder. The purpose of such an organisation is not the coercion of outsiders by insiders, or of some insiders by the rest, but the development within itself of a compelling public opinion.

2. An alliance for coercion functions chiefly through executive machinery. A central Council, representing the most powerful States, is necessary to its effectiveness. Whether the enforceable decisions of this body must be unanimous or may be merely the expression of majority opinion is a matter of secondary importance. The point is that an inner executive group must exist with authority to express the mind of the alliance on every conceivable dispute likely to lead to rupture. The Council is in effect a general staff. The question whether a decision of the Council, when made, will in fact be enforced by the members, is one that concerns the *effectiveness* of the combination, not its nature. A league of selected States that is planned to function through an Executive Council of strong States is essentially a coercive alliance. If the machinery for the enforcement of its policies is powerful and adequate, it is an effective alliance. If the machinery is weak and inadequate, it is an impotent alliance. In either event it is to be contrasted with an association represented only by a standing Council of Conciliation that is marked by three distinguishing characteristics. One is that the members of the Council do not sit as representatives of specified nations. A second is that under no circumstances do they undertake to determine that one disputant is right and the other wrong, but address themselves to an adjustment of the dispute on the theory that there is right on both sides of it. The third characteristic is that nations are not summoned to appear at the bar of the Council and plead their causes, but that representatives of the disputing nations sit in conference with the Council upon the same terms as the other members of the body.

3. In an alliance for coercion there must be at least the semblance of a popular assembly in order that there may be a check upon the executive cabinet. Since the primary purpose of the assembly is to decide the merits of international disputes irrespective of their character, the assembly cannot, in the nature of things, be a judicial body, but must rather adopt the legislative process of reaching decisions by vote. This means that majorities must bind minorities, for the only purpose of voting is to determine which of two wills is to prevail. This, in turn, necessitates the assignment of relative

values to the votes cast, either giving equal effect to the vote of every State or conceding a greater influence to the votes of some States than to those of others. In an association for conference, on the other hand, it is not necessary to provide for any such popular assembly. Since the standing council of conciliation has no powers of decision, there is no occasion to create a check upon it. There is thus avoided a double difficulty. In the first place, the whole machinery of voting is dispensed with. In the second place, the danger is obviated of friction between the council and the assembly, and the consequent development of a distinct and possibly hostile consciousness on the part of each of the two groups within the League. If, in a league for conference, an assembly of members exists at all, its function is merely to choose those individuals who shall from time to time compose the standing council of conciliation.

4. In an alliance for coercion the creation of any international court that is contemplated will naturally be left to the executive council, and the jurisdiction of the court will be made dependent upon the consent of both parties. In such an organisation executive action must always be paramount, and, unless the disputants otherwise agree, the council must be free to decide even justiciable controversies as the expediency of the moment may require. In an association for conference there is a natural and fundamental distinction between the treatment accorded to justiciable and non-justiciable controversies. In the case of the former, an international court will inevitably be created for their decision. In the case of the latter, the council of conciliation will act in an effort to bring the minds of the disputants together.

5. In an alliance for coercion there must be either a central force at the disposal of the council or a system of reciprocal guarantees that the territorial integrity and political independence of each member will be preserved by the others against external aggression. If a central force is lacking, and if this guaranty is weakened or withdrawn, the corner stone of the whole structure is removed. On the other hand, in an association for conciliation there is absolutely no undertaking by the members as to the course which they will pursue if conference fails. If, after conference, the disputants still insist on fighting, each member of the League is absolutely free to stand aloof or to intervene, and, in case of intervention, to choose its side at discretion.

The covenant of the League of Nations is drawn with scrupulous care to conform the organisation to each of these five characteristics

of a coercive alliance. During the long struggle between President Wilson and the Senate repeated attempts were made by the Republicans in that body to modify each of these distinctive features by amendment or by reservation. In every instance the President responded that the proposed change was a nullifying change, and therefore inadmissible. In this, from the point of view of insistence upon a coercive alliance, he was entirely right. From the point of view of an association for conference and conciliation he was consistently and persistently wrong. That President Wilson should insist upon the coercive principle as the basis of a League of Nations was inevitable. His diplomacy has always been the diplomacy of force. He knows nothing of the processes by which minds are brought together. Fruitful conference is, to him, an unknown experience. According to his view Article X of the Covenant is not a provision which is to be explained away and so interpreted that evasion would be a matter of course. On the contrary—

> It is the specific pledge of the members of the League that they will unite to resist exactly the things which Germany attempted, no matter who attempts them in the future. It is as exact a definition as could be given in general terms of the outrage which Germany would have committed if it could. . . . Article X, therefore, is the specific redemption of the pledge which these free Governments of the world gave to their people when they entered the war. They promised their people not only that Germany would be prevented from carrying out her plot, but that the world would be safeguarded in the future from similar designs.

It was inevitable that the people of the United States should refuse assent to any such commitment. A solemn undertaking to put forth such force as was invoked against Germany, without knowing the issue to be determined or the nation against which the force might be directed, was one which they could not too strongly condemn.

Before the vote was taken League advocates tried hard to persuade the voters that the language of the Covenant was not to be taken too seriously. Two arguments were constantly made. One was that, in case of emergency, the right of Congress to refuse to declare war might always be used as a means of escape from a covenant to declare it. The other was that the United States might safely join the League and then transform it by pressure for amendment. Both arguments proved unavailing. One was repudiated as an affront to national morality. The other was rejected as an insult to popular intelligence. It is safe to predict that neither

argument will be pressed again. The United States will make no covenant except with the intention of literal performance. The nation will enter no League until changes deemed necessary have first been made in its structure.

The nations now members of the League and capable of influencing League policy will determine in due time whether they themselves are content to continue the League as a coercive alliance. If they are not, the way will immediately be opened for a reconstruction in which the United States will gladly join. If, however, the coercive principle is still approved by the League members, they must consider whether or not a surrender of the principle is too high a price to pay for the co-operation of the United States. If the price be deemed fair, the problem of transformation becomes merely a question of method. It is not profitable to discuss, in the first instance, whether the method should be that of reservation, of amendment or of redraft. The important points are that inclusive membership must be substituted for restricted membership, that a standing Council of Conciliation must take the place of the executive cabinet, that the process of voting must be abandoned in favour of the conference method, that the subordination of the judiciary to the executive must give place to a Court which shall be supreme in its sphere, and that, instead of covenants to unite in resisting aggression, there must be absolute freedom on the part of each State to act as it pleases whenever conference fails to avert war.

It is not a little significant to note that the features of the League most valued by many of its ablest advocates are features which not only would be unaffected by this transformation, but are themselves much more in harmony with the ideal of conciliation than with the principle of coercion. Reduction of armaments is a case in point. The policy of open diplomacy is another. A standing Council of Conciliation equipped to turn the pitiless ray of publicity upon all international transactions would quickly prove its value to the world. The mediatorial function can hopefully be undertaken by a council without power to bind, while upon a strong executive organisation such a function is merely an excrescence. The atmosphere of a league for international conciliation is congenial to all the economic and social reforms referred to in the Covenant. Indeed there are multitudes of people who have merely tolerated and excused the coercive features of the Covenant in order to secure the many real advantages for which it makes provision. To eliminate all hints at coercion and commitment would gratify the vast

majority of League supporters and satisfy its most determined opponents.

It is not unusual to refer contemptuously to a League for conference and conciliation as a mere debating society. Such a taunt falls usually from the lips of those who are incapable of appreciating the value of conference as an agency for bringing minds into accord. With much greater justice might contemptuous reference be made to the present strong Executive Council of astute politicians representing the fighting nations of the world and masquerading as the promoters of peace. Neither taunt is just, and neither should be made. The plain fact is that world-wide organised coercion must fail, and that, for lovers of peace and order, the true choice is between international chaos and a League dedicated to the ideal of conciliation and to the method of conference.

It is in such a League that the United States may be of maximum use to other nations. Circumstances are compelling the people of the United States to work out within their borders the racial problems which underlie the world's unrest. Great racial groups that find it possible to live together in unity under one flag may have something of value to contribute to the settlement of over-seas disputes between their brothers in blood. The same fact that makes an alliance for coercion impossible for America discloses in a League for conference America's greatest opportunity.

THE CONSTITUTION AND ORGANISATION OF THE CLEARING OFFICE (ENEMY DEBTS).[1]

[*Contributed by* PROFESSOR A. H. CHARTERIS, LL.B., *Challis Professor of International Law in the University of Sydney.*]

UNDER the Treaty of Versailles the adoption of the clearing office system for the settlement of pre-war enemy debts, as provided in Section III of Part X, is open to any Allied and Associated Power which gives notice to that effect to Germany within one month of the deposit of ratifications of the Treaty. Notice having been duly given by the British Government on behalf of the Empire, excluding the self-governing Dominions and India, which have independent power of adopting Section III, the Clearing Office (Enemy Debts), established under the Board of Trade, was opened at Cornwall House, Stamford Street, S.E.1, on January 12, 1920, two days after the Treaty came into force. The domestic authority for its establishment is found in the Peace Treaty Order in Council, 1919 (Statutory Rules and Order No. 1517), par. 1(1), which was made under the Treaty of Peace Act, 1919 (9 & 10 Geo. V, c. 33), and directs that Sections III to VII of Part X of the Treaty, as set out in a schedule, shall have full force and effect as law. The Order, which was amended by the Treaty of Peace (Amendment) Order 1920, contains the provisions required for carrying out the said Sections.

The principal Order applies to the United Kingdom and H.M. Dominions and Protectorates, except the self-governing Dominions and India. But the latter, with the exception of South Africa, have all adopted the clearing office system. The Protectorate of Egypt and the Mandated Territories of the ex-German colonies in Africa are excluded from the system.

Local Clearing Offices to the number of forty have been established throughout the Empire,[2] but for the purpose of notifying and crediting

[1] This article deals only with the Clearing Office as organised for the settlement of enemy debts between the British Empire and Germany under the Treaty of Versailles. It should not be forgotten that it has further important functions in the settlement of debts with Austria, Turkey and Bulgaria, under the later treaties with these countries, in respect of which, however, the Clearing Office system has been modified in many important respects (*cf.* Treaty of Peace [Austria] Order in Council of August 13, 1920).

[2] The provisions of the principal Order have been applied by the following local Orders in Council: In Canada by the Treaty of Peace (Germany) Order 1920 of April 14, 1920; in Australia by Regulations under the Treaty of Peace Act, 1919, Statutory Rules 1920, No. 25; in New Zealand by the Treaty of Peace Order in

debts to the German Clearing Office it is the Central Clearing Office which alone is important. In most cases the Local Controller is the official who was the Custodian of Enemy Property under the Trading with the Enemy Acts.

The Status of the Department.—Although under the Board of Trade for the appointment of the staff, and subject to the consent of the Treasury as to the number and remuneration thereof, the Clearing Office ranks for many purposes as an independent Department, *e.g.* for communicating with other Government Departments and consulting the Law Officers of the Crown. Moreover, under the Peace Treaty Order in Council, proceedings by and on behalf of the Clearing Office may be taken by and in the name of the Controller, who may by that name sue and be sued, and costs may be awarded to or against him (S. I (X)). Every document purporting to be an order or other instrument issued by the Clearing Office, and to be signed by the Controller or the Secretary, or other persons authorised by the Controller, shall be received in evidence and deemed to be such order or instrument and without further proof until the contrary is shown (S. I (XI)). A certificate signed by the Controller that an order or other instrument purporting to be made or issued by the Clearing Office is so made or issued shall be conclusive evidence of the facts so certified (S. I (XII)).

Scope of Operation.—Under the Order in Council Section II " enemy debts " has the same meaning as the pecuniary obligations defined in Article 296 of the Treaty. The effect of these provisions is briefly that, subject to the condition of the opposing parties to the debts being British and German nationals respectively residing within the territory of their own State, the Clearing Office is the sole channel for settling (1) debts payable before the war, (2) debts payable during the war and arising out of pre-war transactions or contracts of which total or partial execution was suspended on account of the war. The material date for testing nationality and residence is January 10, 1920, the date on which the Treaty came into force. Further, the Clearing Office has exclusive competence in claims for (*a*) interest or (*b*) capital sums payable before or during the war in respect of Government Securities, provided the Debtor Government has not suspended payment in either case to its own nationals or to neutrals.

To secure the exclusive competence of the Clearing Office the Order

Council of June 7, 1920, and in India by the India Treaty of Peace Order in Council 1920 (June 28, 1920). In the Crown Colonies and Protectorates local Ordinances, which vary slightly in point of form, have adopted the text of the principal Order. The clearing house system has not been adopted in Egypt, where special provision is made in the Egypt (Treaty of Peace) Order in Council of July 22, 1920, and the Egypt (Treaty of Peace) amendment Order in Council of March 25, 1920. For the former German Colonial possessions, administered by Great Britain under Mandate from the League of Nations the mode of applying Part X (but excluding the clearing office system) is shown in the Tanganyika (formerly German East Africa) Order in Council, 1920 (July 22, 1920). *London Gazette*, July 30, 1920, p. 7951).

prohibits under the penalties of the Trading with the Enemy Act, 1914, against (*a*) payment or acceptance of payment of an enemy debt by any person otherwise than through the Clearing Office; (*b*) communication between British debtors or creditors with the corresponding enemy parties except through or by leave of the Clearing Office (S. I (II)); (*c*) private legal proceedings for the recovery of enemy debts except where a dispute between the Clearing Offices as to a debt is referred to the Creditor Office to the Courts of the place of domicile of the debtor under Section XVI of the Annex to Section III, or where by a decision of the Mixed Arbitral Tribunal a claim is held not to fall under Article 296 of the Treaty (S. 23 of the Annex), or the Clearing Office grants a certificate of rejection of claim by its own national (S. 25 of the Annex).

Recovery of Debts from British Nationals.—The Clearing Office has also power under Section I (IV) to enforce payment with treaty interest at 5 per cent. of an enemy debt due by a British debtor to a German creditor. A debt admitted by the debtor or found due by a decision of the Mixed Arbitral Tribunal or by arbitration, or, where competent, by a Court of Law, can be enforced against the debtor by means of a certificate of the Clearing Office when registered in a Supreme Court of the place in which the debtor resides. All reasonable costs and charges attendant upon the registration of such certificate are recoverable as if they were part of the judgment. The Clearing Office is further empowered under Section I (V) to recover from any person the penal interest at 5 per cent. under par. 10 of the Annex to Section 296, viz. on the part of a debt not admitted in whole or in part, or on the part of a claim disallowed, such interest to run from the expiry of the period of three months from the notification of the receipt of the debt to the Clearing Office until date of payment.

Under Section I (VI) the Clearing Office is empowered to deduct a commission not exceeding 2½ per cent. on sums payable by the Clearing Office to British nationals.

German Assets.—The chief of the remaining provisions is Section I (XVI) subjecting the property, rights and interests within His Majesty's Dominions and Protectorates belonging to German nationals (in short, German assets) at the date of the Treaty coming into force, to the charge which is provided in par. 4 of the Annex to Section IV of the Treaty. The purpose of the charge on German assets is to provide security for the due fulfilment of the obligations of Germany in regard to British claims under Article 297 (compensation for damage to British property, rights and interests by war measures) and under Article 296 (Enemy Debts), and also of the obligations of Germany's Allies in regard to British compensation claims against them. The necessary provisions for carrying the charge into effect are detailed in the following sub-section (XVII). It should be noted that by the Treaty of Peace (Amendment) Order in Council, 1920, Section I (XVI) of the principal Order is amended to make British claims under Article 297 and Article 296

as against Germany rank on German assets *pari passu* in priority to British compensation claims against Germany's Allies. The assets consist of all German property of whatever nature in the British Empire whether already vested in or paid to the Custodian of Enemy Property and his corresponding officials in the Protectorate and Dominions or not. Under Section (XVII) (*d*) the Board of Trade is given power by order to vest any enemy property, rights and interests in the Custodian, and for this purpose Section IV of the Trading with the Enemy Act, 1916, applies, notwithstanding that Germans are no longer enemies by reason of the Treaty of Peace.

Work of the Office.—The magnitude of the work of the Office is shown by the following figures of German and British claims put forward to the respective debtor Clearing Office under Article 296 up to and including September 15, 1920:

	Number.	Value.
German claims received . .	83,247	£19,726,862
British claims put forward . .	56,864	£34,591,281 14*s.* 5*d.*

The German claims are more numerous but for smaller amounts than the British. It is probable that the volume of British claims will exceed that of British indebtedness. Statistics based on the Public Trustee's records are an uncertain guide, since there was no obligation on British debtors under the Trading with the Enemy Acts to register debts due to Germans of less than £50 in amount.

The staff which the Controller, Mr. Egerton S. Grey, Senior Official Receiver in Bankruptcy, has organised for this work includes permanent civil servants lent from other departments, barristers, solicitors, accountants and business men, as well as a large number of clerks. The number employed (666 in September) itself indicated the importance of the work of the Office, and it was expected to increase with the growth of Austrian, Turkish and Bulgarian business.

Advisory Committees.—To meet the difficulty of providing in a Government organisation a staff of experts competent to deal with all the multifarious technicalities of international trading, the Controller is assisted by five expert advisory Committees appointed by the principal trade Associations with separate Secretaries. It has been suggested that similar committees should be formed in Germany, and also that the British and German Committees should hold joint meetings to agree the claims of their respective nationals, but such meetings have not yet taken place. The British Committees are:—1. Marine Insurance and Reinsurance Committees consisting of representatives of Lloyds', the London Underwriters and the Liverpool Underwriters. 2. Life Insurance Companies Committee. 3. Fire Insurance Companies Committee. 4. Liverpool Cotton Association Committee. 5. Clearing Bankers and Accepting House Committee.

The function of these Committees, especially of the Marine Insurance

Committee, is to advise on customs of trade, and, where possible, to adjust the claims of their members for presentation to the German Clearing House, as well as to deal on the technical side with German claims. In addition to the Trade Committees there is an official Advisory Committee.

It should be mentioned also that meetings are held at regular intervals between the British and other Allied Controllers (viz. Belgian, French, Italian, Siamese and Greek) for the purpose of elucidating in common difficult questions of interpretation of the Treaty of preserving unity of policy in the administration of the Clearing Office System *vis-à-vis* Germany.

Claims Department.—The Claims Department deals with claims both by British and by German creditors. When a German claim against a British debtor is received by the Clearing Office it is first checked against the Public Trustee's Records (which were transferred to the Office after the Armistice) to ascertain whether the debtor has registered his debt, as required in respect of those over £50, by the Trading with the Enemy Acts. If there has been no registration, the debtor is asked for an explanation, and an unsatisfactory explanation may be reported to the Public Trustee for action. Claims which are in order are entered in the schedule of approved claims to be sent to Berlin. The claim itself is ultimately passed to the Liaison Department in Berlin for presentation to the German Clearing Office.

Defective claims obviously fall into two classes: those which are outside the clearing office system as not being enemy debts within Article 296, and those requiring amendment in some particular.

If the defect is incurable the claim will pass in to the rejected class. Objections taken by the German debtor are in due course communicated to the British claimant through the Clearing Office.

As the bulk of the British claims have been presented to the German Clearing Office, the work of the Claims Branch becomes increasingly concerned with German claims, which in the same way are examined for formal defects, compared with the Public Trustee's Record of registered debts to Germans, and, according to the Claims Examiners Report, may be placed on the schedule of Admitted Debts, or become the subject of dispute with the British debtor. Here again they may be referred to the German Liaison Officer attached to the Clearing Office, or to the Legal Branch for advice on a point of law. The ultimate Tribunal for settling unsolved disputes is the Mixed Arbitral Tribunal or an agreed Arbitrator. It is when the debt is admitted that the claim passes to the next main Branch, the Accounts Section, whose main function is to ascertain the net monthly balance of indebtedness (*i.e.* debts admitted by either Clearing Office) between Germany and the British Empire. This monthly indebtedness is the aggregate of all the monthly balances between Germany and the United Kingdom, the Self-governing Dominions, the Colonies and Protectorates. Under the Treaty of Versailles

(Article 296 (*d*)) such indebtedness is to be ascertained in the currency of the country concerned at the pre-war rate of exchange between that country and Germany, the rate being defined by the Treaty as " the average cable transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between it and Germany."

All the said balances are brought into an aggregate Monthly Account on a prescribed day of settlement which, under the Treaty, must be within a week of the end of the month. In order to arrive at a figure which represents the aggregate balance of all the admissions made in or in respect of the Empire within that month, the balances due to or from the various territories composing the Empire are converted into sterling at the rate of the day of settlement, so that the aggregate monthly balance between Germany and the British Empire is arrived at in the first instance in sterling. It is the task, then, of the Accounts Section to gather together the whole of the month's admissions for and against each part of the British Empire concerned, and arrive at the aggregate monthly balance in the manner stated.

The Accounts Branch also deals with the collection, together with interest in accordance with the Treaty, of German claims which a British debtor admits but has not already paid to the Public Trustee under the Trading with the Enemy Acts.

Compensation Claims under Article 297.—Apart from claims for enemy debts under Article 296, resulting in the Monthly Account, the Clearing Office also deals with claims of British nationals under Article 297 for compensation in respect of damage or injury inflicted upon their property, rights and interests in German territory as it existed on August 1, 1914, by the application of " exceptional war measures " or measures of transfer as defined in paragraphs 1 and 3 of the Annex to that Article.

The claims referred to are those which are not met by the proceeds of liquidation which Germany under Article 297 has to credit to the British Clearing Office. In default of a settlement by agreement it will be necessary for claimants to take proceedings before the Mixed Arbitral Tribunal or an arbitrator appointed thereby.

If a settlement is agreed it will also be necessary to obtain the formal decision of the Tribunal in order that the agreed amount may be recovered through the Clearing Office as if it were a debt admitted by the Debtor Clearing Office (par. 17 of Annex to Article 296).

The amount of compensation, as fixed by the Mixed Arbitral Tribunal, is to be borne by Germany. If not paid by Germany it is charged on the German assets under the control of the claimant's State. Thus, in default of payment by Germany, British claimants will be paid out of the realisation of German assets in British territory. The total of the claims determined will be carried to the debit of Germany in a Liquidation Account, and as against these debits Germany is entitled to be credited

in respect of the sums realised from any German assets in British territory. Any final balance of these credits under Article 243 will go to reduce the amount due by Germany to Britain in respect of her reparation obligations.

Mixed Arbitral Tribunal.—The Mixed Arbitral Tribunal between Britain and Germany provided for by Article 304 has now been constituted, consisting of Mr. R. E. L. Vaughan Williams, K.C., as British member, Dr. Zacharias, a judge of the High Court in Hamburg, as German member, and M. E. Borel, a distinguished Swiss lawyer from Lausanne, as President. In terms of the Treaty the nomination of the President was entrusted to M. Gustav Ador, on the failure of the two Powers to agree on the appointment of a President. The office of the Tribunal has been established at 21, St. James's Square, the Secretary being Mr. Harold Russell, Barrister-at-Law.

Under the Treaty (S. 304) each contracting Power shall appoint an Agent before the Mixed Arbitral Tribunal who shall be responsible for the cases presented on behalf of the respective Clearing Office, viz. disputes between the offices as to whether a debt claimed is due, or differences between the offices. The Agent will not only be responsible for presenting the case on behalf of the Clearing Office, but exercise a general control over representatives or counsel employed by British nationals in their own cases. He is empowered to intervene along with such national or reopen and maintain a claim abandoned by the same.

The decisions of the Tribunal will be of the first importance, not only in the construction and interpretation of the Treaty, but in the decision of concrete cases. The Anglo-German Tribunal, however, is only one among many, since the Treaty provides for the establishment of a Mixed Arbitral Tribunal between each of the Allied and Associated Powers on the one hand and Germany on the other. They will, therefore, be Courts of co-ordinate jurisdiction whose decisions are final on the questions brought before them, but will not necessarily be in agreement with each other.

The Tribunal has important functions under Sections III (Enemy Debts), IV (Claims for Compensation), V (Contracts, Prescriptions, Judgments), and VII (Industrial Property).

Under Section III it is one of the alternative methods of settling cases of disagreement between the Clearing Offices as to whether a debt claimed is due, or differences between an enemy debtor and an enemy creditor, or between the Clearing Offices, the other methods being private arbitration of the parties, or, at the request of the Creditor Clearing Office, reference of the dispute to the Court of the place of domicile of the debtor. Recovery of sums found due by any of these methods is made through the Clearing Offices as if they were debts (Sections XVI and XVII of Annex to Article 296). The Tribunal has also appellate jurisdiction at the instance of a party against a joint decision of the Clearing Offices.

The Treaty provides that the decision of the Mixed Arbitral Tribunal shall be final and conclusive, and binding on all Courts of the High Contracting Parties. The Peace Order in Council Section I (XIV) gives effect to this provision.

Under Section IV, Article 297 (*e*), the Tribunal or an Arbitrator appointed thereby determines the amount of compensation claimed by British nationals in respect of damage to their property, rights and interests in Germany as it existed on August 4, 1914, caused by German exceptional war-measures or measures of transfer, as mentioned in the annex to par. 1 and 3 of the Annex to the Article. These claims are competent over and above the right to the proceeds of liquidation of British property rights and interest, and even if the amount be agreed between the British and German Governments the case must be presented to the Tribunal for an agreed judgment so that the sum found due may be recovered through the Clearing Office.

Under Section V the Mixed Arbitral Tribunal is competent to grant equitable compensation to an Allied and Associated national where a pre-war enemy contract to which he is a party is exempted from dissolution by his Government in the general interest, and he is substantially prejudiced owing to the contract being kept alive in altered trade conditions.

It has also important powers under Article 300 (*a*) to hear claims by an Allied and Associated national who is prejudiced by a German measure of execution against his property in Germany taken in consequence of his failure to perform any act or comply with any formality during the war. These powers exist only when the case does not fall within the competence of the Courts of an Allied and Associated Power.

Where in the opinion of the Tribunal restoration of the prejudiced rights is inequitable or impossible the Tribunal may award compensation to be borne by the German Government.

There is similar jurisdiction over claims of damage by Allied and Associated nationals in respect of measures taken by Germany in invaded or occupied territory, provided such nationals have not been otherwise compensated (S. 300 (*e*)).

Under Article 302 the Tribunal has jurisdiction to award compensato an Allied or Associated national who has suffered prejudice through a judgment of a German Court in Germany or in invaded or occupied territory during the war in a case in which such national was not able to make his defence. At the instance of such national the compensation may, where possible, take the form of restoration to the *status quo* before the judgment.

Under par. 12 of the Annex to Article 303 the Tribunal has power to appoint an actuary to determine the proportion of assets to be handed over by a German Insurance Company in respect of policies of insurance with nationals of Allied and Associated Powers which such Powers cancel within three months of the Treaty coming into force.

In accordance with the general policy of the economic clauses in excluding the jurisdiction of the German Courts where the rights of Allied and Associated nationals in regard to pre-war enemy contracts are concerned, jurisdiction is conferred on the Mixed Arbitral Tribunal, in default of agreement of the parties, to fix the conditions on which new licences at the demand and in favour of such nationals in respect of rights of industrial, literary or artistic property acquired under German law shall be granted (S. 310).

Much light on disputed points in the economic clauses may be expected from the decisions of the Mixed Arbitral Tribunals. In the event of the Tribunals agreeing the interpretation may be taken to be authoritative.

THE VENDETTA[1]

[*Contributed by* R. R. MARETT, ESQ., D.SC.]

DR. BUSQUET'S admirably thorough study of the Corsican Vendetta[1] will deeply interest all students of comparative law. We here can bring to the test of a crucial instance—and one, moreover, that is provided by a people dwelling within the confines of European civilisation—the worth of a principle common to the whole of the primitive world, namely, the principle of private justice. To those educated in that one-sided philosophy of law known as analytic jurisprudence, it may seem impossible that justice or law in any form can exist apart from the sovereign state. With the use of the historical method, however, comes enlightenment. It thereupon appears that, as so often occurs in the world of human and even animal endeavour, progress is born of conflict, the need to solve a contradiction seeming to generate the energy that makes for eventual betterment. Thus, in the special case of the development of law, two distinct methods of repressing disorder came into existence side by side, and sooner or later were brought into collision. In the ensuing struggle for mastery of the whole machinery of the law, the public mind grew by degrees self-conscious in regard alike to the end and to the means of legal enactment, and a corresponding vigour of legal reform was gradually engendered. No doubt, if one surveys the history of this struggle from the standpoint of the achieved result, one can see that the principle of public justice—in other words, that of the all-sufficiency of the law of the state —was from the first destined to win. Even so the rival principle of private justice, as embodied in such an institution as the vendetta, deserves full credit at the hands of the historical jurist for the part it has played in stimulating the state-lawyer to invent an improved substitute

[1] *Le Droit de la Vendetta, et les Paci Corses.* Par J. Busquet, Docteur en Droit. etc. Paris: A. Pedone, Editeur, 1920.

for it, and in general to consolidate the hitherto scattered and occasional efforts of private groups to maintain the balance of society.

We need not follow our author in discussing—as, to be sure, he does lightly and by the way—the ultimate origins of the Corsican custom. Whether the aboriginal population of the island be derived from Libya or from Liguria, or, as seems most probable, from both, the ethnic problem has no bearing on the present question; since any and all of the immigrants must have known the practice of blood-revenge. Thus, Sir E. Tylor notices "the wonderful ethnological generality of the primitive law of blood for blood among mankind." "Questions of bodily form and complexion," he says, "questions of connection of language, have no direct bearing on it; it belongs to races of all colours, of all linguistic frontiers, of all ages of chronology, with but this one limitation, which lies at the very root of the matter, that it is characteristic of the lower organisation of society."[1]

Why is it characteristic of a low organisation of society? Because it is coeval with that form of society which may be described as a more or less unconsolidated group-system. Thus, according to Lewis Morgan, "it had its birth-place in the *gens*."[2] So long as we do not take the term *gens* too strictly, but use it to denote any small group of the "familial" type, whether blood or local contiguity provide the main bond of union, the statement, even if hardly precise enough to suit the modern anthropologist, will suffice for the moment; and we may think of blood-revenge as a sort of gentile *Faustrecht*. It is the necessary condition of the very existence of the small and semi-independent group that it should regard the death of one of its members at the hand of a member of a neighbouring group as a *casus belli*. Whereupon both groups as such are involved in the quarrel. Hence on both sides there comes to be recognised a principle of communal responsibility; or, as Dr. Busquet expresses it, *la vengeance est transversale*. Moreover, in the eyes of the primitive man, the group is composed of dead as well as of living kinsmen. Responsibility, therefore, is not only communal, but at the same time hereditary. Vendetta is *il debito di sangue*. The *manes* of the dead must be appeased. No sentiment could be more efficacious at the level of primitive society to render the group conscious of itself as a moral unity. For this very reason, namely, that honour, and something even deeper than the sense of honour, namely, the awe which culminates in ancestor-worship, are engaged on the side of the custom of blood revenge, it is apt to maintain itself, as in Corsica, even when the material consequences are likely to be unpleasant for all concerned.

Before passing on to consider the material consequences of the vendetta, we should like to dwell a moment longer on the religious and ethical aspect of the practice. Dr. Busquet, whose researches carry us back beyond recent conditions to those prevailing centuries ago, when the

[1] [Sir] E. B. Tylor, *Contemporary Review*, xxii. 56.
[2] L. H. Morgan, *Ancient Society*, 77.

custom was in fuller vigour, has some brief but highly interesting remarks on what we can only call the taboos associated with the duty of vengeance. Thus, hair and beard must not be cut by the avengers until they have accomplished their mission. Such a " negative rite " indeed holds good up to the present day. It means more than a vow to abstain from comfort until duty is done. In the eyes of the savage it is but one of the many abstentions incumbent on all men who, whether temporarily or for life, are in a state of sacredness. Such persons are in a state of tension, we may say, which presently will discharge itself in some act of power that is beyond the ordinary. To let oneself go on every-day trifles relaxes the tense mood prematurely, and consequently no wonder is worked. In anthropological language, no *tabu* no *mana*. For the rest, the Corsican ritual evidently imposes other abstentions beside, the duty of avoiding the barber. Thus we read : *Les affaires de la maison sont laissées au soin des femmes, la nourriture est rendue plus frugale que d'habitude : du pain, peu de viande, et de l'eau claire ; plus de nappes ou de serviettes.* This is a system of preliminary taboos that has perhaps somewhat declined from the perfect savage model. A North American brave, before going on the war-path, would be even more severe in his methods of self-mortification. But at least we have here a survival of the primitive notion that, to fulfil the highest and most strenuous type of duty—in a word, a religious duty —a man must abandon the profane world by performing a *rite de passage*, and undergoing what Dr. Busquet well terms *une sorte de retraite morale*. Thereby he becomes acclimatised, as it were, to the keener atmosphere of the sacred world ; and, after brooding a while on the threshold of his task, he can proceed with that fully braced will which is the source of all man-made miracle.

So far we have tried to look at blood-revenge as a sacred duty which every good group-fellow must carry out, regardless of material consequences. Those consequences, however, do in practice tend to be disastrous. For the logic of the blood-feud is altogether too thoroughgoing. The principle that slaying must always be met by counter-slaying involves an infinite process. To cite Sir E. B. Tylor again : " The inevitable tendency between clan and clan to make reprisals, avenging vengeance as murder, is one cause of those incessant tribal wars which, more than anything else, have brought about that wretched, hunted, hand-to-mouth life which kept the Australians down so near the bottom of the social scale." [1] Thus, even among the most backward peoples we find all sorts of attempts made to regulate and limit the war between groups of the same tribe, so that it shall at all events be milder in its effects than war between the tribe as a whole and its foreign enemies. The very Australians whom Tylor holds to pursue the system of blood-revenge to its greatest lengths have contrived all manner of ingenious devices to mitigate intratribal hostilities. Thus, instead of whole groups engaging in conflict, chosen champions contend, and we have in effect

[1] Tylor, *ibid.*, 55.

the duel. Or individual responsibility is actually recognised so far that the culprit is induced to satisfy the aggrieved party by submitting to a shower of throwing-clubs and spears—which he usually manages to dodge. These methods of conciliation, it would seem, are not the result of any reasoned policy, but rather come into operation of themselves when tribal gatherings occur, forcing as they do the component groups to meet face to face. Custom thereupon decrees that, if they are to quarrel, they must quarrel at once, and be done with it. These regulated encounters are, as it were, degenerated combats. For the savage is ever ready to discharge emotion on the symbol and to find in mere make-believe the satisfaction of a purpose which it would be too irksome to realise objectively. So spears are thrown, and perhaps blood is drawn. Wrath being thereupon exhausted, the parties spend a noisy and otherwise delightful evening together.

It remains to note, however, that two entirely distinct modes of mitigating the blood feud have to be recognised by the historical jurist. The one mode depends on the initiative of the contending groups themselves. The other involves the interposition of a higher authority in the shape of the sovereign tribe or state. These modes, though utterly different in principle, may be practised together in the same community. Indeed, as we shall see, this was the case in Corsica. Law, however, like religion, tends towards system and uniformity; and, if radically disparate procedures are tolerated as alternatives, a certain measure of political incoherence may generally be ascribed to the community concerned.

On the one hand, then, the contending parties themselves may try to come to a settlement. In that case, they must behave exactly as two tribes or states that mutually desire to bring a war to an end. Sometimes an informal truce is concluded by the simple method of suspending overt hostilities. It is felt that honour is mutually satisfied, and that it is time to cry quits. The *lex talionis*, after all, does not express the spirit of the unlimited blood-feud, but, on the contrary, suggests a limitation based, as it were, on a mathematical intuition. "An eye for an eye," "a man for a man," are maxims that suggest a give-and-take attitude, a willingness to set off gains against losses, so that equilibrium may be restored. The rudest peoples, however, have a taste for ceremonial; and a formal peace-making is usually required to compare and audit the head-hunting accounts, and at the same time to clinch matters by the exchange of solemn oaths. In such cases, negotiations tend to fall into the hands of certain peacemakers and go-betweens; and it is interesting to find, in lowest Australia, that women are prone to act in this capacity. At a higher grade of society the peacemaker assumes the character of a disinterested judge, or rather arbitrator.

Such arbitrators were the *paceri*, or mediators of Corsica. They were invited to assist by the groups desirous of a settlement, or might spontaneously offer to do so, and be accepted by the parties. Thereupon

they conducted negotiations and drew up terms, being endowed by the contracting groups with more or less extensive powers to decide what was equitable. Now the position of a go-between is never an enviable one, as he is apt to become the target of the missiles of both combatants. Even so, the *paceri* were exposed to risks at the hands of either side, while the treaty was pending. For they were supposed to guarantee the sincerity of all concerned, and might suffer in their goods, or even as regards their lives, if one group chose arbitrarily to go back on its promises. As soon, however, as the settlement was complete the responsibility of the *paceri* ceased, and the treaty itself might contain a clause to this effect. Such, then, was a mode of regulating the vendetta, which was itself part and parcel of the system of private justice. No third party in the shape of the state called the combatants to order. They themselves found a mutual friend, who could bring them to terms. For the rest, this mediator could in no way enforce his decisions, but must secure goodwill on both sides by suggesting amicable arrangements, a money-payment to wipe off an injury, or, better still, a marriage to turn the rival families into one.

The other mode of bringing private feuds to an end is for the central authority to interpose in some more or less coercive fashion. It might seem at first sight that such an exercise of power on the part of the community as a whole is a relatively late development. In point of fact, however, a public justice exists side by side with a private justice among the most primitive peoples known to science. Certain offences, such as treason or witchcraft, are the concern of all, and the offender usually receives short shrift from those that are outraged. In what may be regarded as the typical case the community resents a pollution. A major taboo has been violated, and it is feared that ill-luck may descend on the heads of one and all. But squabbles about homicide are in low-grade society for the most part regarded as private affairs. If a man of the Kangaroo group kills a man of the Emu group next door, it does not affect the tribal luck, as undoubtedly would happen if the Kangaroo man were to commit the horrible sin of marrying a Kangaroo woman from a hundred miles away. As society advances, however, a central authority may arise wise enough to resent and strong enough to suppress intra-political disorder as such. The history of this development is very complex, and cannot be discussed here.[1] It would seem, however, that a condition favouring the establishment of a strong central authority is the fusion of two peoples, one of which is more advanced in culture than the other, such fusion usually being the result of conquest.

Now, in the case of Corsica, the state has for long represented a foreign domination. The natives might therefore regard with legitimate suspicion the efforts of the supreme power to regulate their affairs as inspired by other motives than a disinterested love of public order. The Genoese,

[1] Perhaps the clearest account in English is to be found in the third edition of Professor Hobhouse's *Morals in Evolution*, ch. iii.

for instance, did their best to break the back of the vendetta system. But the public justice they offered in place of the home-made article was, to say the least, venal. For the rest, the violent methods of suppression to which recourse was had were precisely the same as those whereby the other and more reasonable liberties of the islanders were being curtailed. No wonder, then, that in those fastnesses whither the officers of the public law could never come, the primæval system of a justice founded on the principle of retaliation lingered on till yesterday. To-day the benevolent rule of France is reconciling the sturdy hill-men to the only justice compatible with a high civilisation.

One word more. France governs Corsica successfully because she is sympathetic. If no other proof were available, this book supplies it. Dr. Busquet knows and loves his Corsicans. They have opened their hearts to him, and he has thus acquired his rare knowledge of their customs at first hand. The student of comparative law may trust him for his facts; and these facts, though they relate primarily to a small island, open up, as we have tried to show, vistas that extend over the whole wide expanse of the primitive world.

DEATH CERTIFICATION.

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In striking a balance-sheet of the assets of a nation, the profit and loss account in lives forms a very important part of the accounting.

The addition of new lives in offspring as well as the deaths at all ages of the units of population must always be a matter of solicitous concern to the State. Depending upon whether there is an increase or decrease of the former over the latter is the progressive or retrogressive movement of a nation. Population has a reasonable claim upon a State to ask that, as far as possible, those causes which operate inimically to the maintenance of health and which may be causative of death should be mitigated or removed, and particularly that the lives of its citizens should be protected against deaths by violence, if preventible, and especially those of criminal origin.

In order to compute the profit and loss account in lives, it is essential in the case of deaths as well as births that a record should be kept of each, and that the cause of death should be satisfactorily accounted for. For this reason a body of legislation has been enacted for the prevention of accidents by machinery in industry, and Acts of Parliament have been passed for the compulsory registration and certification of the causes of deaths. Prior to certification of deaths, it is well to keep in mind that, for a long period antecedent to compulsory certification of causes, registration of baptisms and burials was ordained in England in 1538 by the institution of parish registers.

The object of certification of deaths is twofold, viz.: (1) to designate the cause of death for statistical purposes, and (2) to prevent criminal practices.

While the law desires that the causes of deaths should be accurately certified as far as possible, it certainly expects that the medical practitioner shall be able to say whether these were due to natural or to unnatural causes. If the practitioner is satisfied, from his attendance on a deceased person, that the death was due to natural causes, the knowledge of this fact would entitle him, nay, would compel him, to certify, and the statement of fact probably would end the matter. On the other hand, if the practitioner has grave suspicion, and, more so, if he sees actual proof that the death was due to an unnatural cause, then his clear duty in the former case is to decline to grant a certificate, and in the latter to state the facts as known to him, leaving the matter to the legal authorities to deal with the questions of cause and culpability. Reasonable suspicion of foul play would be a justifiable cause for withholding a certificate. Keeping in view that a medical practitioner never ceases to be a citizen, his duty as a citizen is to assist in bringing criminals to a bar of justice.

Royal Commission, 1869.—Proper certification of deaths has long occupied the attention of those interested in the subject. The Royal Sanitary Commission of 1869 made a suggestion in their Report to overcome the possibility that bodies might be interred without any certification of the cause of death being made. They said:

> In the case of any person having died without a medical attendant, or whose medical attendant refuses to sign the cause of death, the medical officer of health of the place in which the death occurred should be required and authorised to make, by himself or deputy, inquiries as to the cause of death, and thereupon either to give a certificate of the cause or to take steps towards a coroner's inquest. It would seem to be well worthy of inquiry and consideration on the part of the Government how far, when this complete system of registration of deaths is established, the holding of coroners' inquests as at present might be limited.

In the seventies and eighties of last century "uncertified deaths" in Scotland were conspicuously large in numbers. The attention of the present writer was attracted to the subject, and he read a communication before the Glasgow Philosophical Society, afterwards published in its *Transactions*,[1] in which he dealt statistically with the question, and reviewed the law of certification and suggested some reforms.

Select Committee, 1893.—In 1893 a Select Committee was appointed by the House of Commons on the subject of Death Certification, the reference to that Committee being:

> To inquire into the sufficiency of the existing law as to the disposal of the dead, for securing an accurate record of the causes of death in all cases, and especially for detecting them where death may have been due to poison, violence, or criminal neglect.

[1] *Trans. Roy. Phil. Soc.*, Glasgow, 1885.

This Committee took evidence and the present writer, with many others, was called to give evidence before it. The report of the Committee was ordered to be published on August 15 and September 1, 1893, and forms an interesting Blue Book.

The following is a summary of the principal recommendations of the Committee:

1. That in no case should a death be registered without production of a certificate of the cause of death signed by a registered medical practitioner or by a coroner after inquest, or in Scotland by a Procurator Fiscal.

2. That in each sanitary district a registered medical practitioner should be appointed as public medical certifier of the cause of death in cases in which a certificate from a medical practitioner in attendance is not forthcoming.

3. That a medical practitioner in attendance should be required, before giving a certificate of death, to inspect personally the body; but if, on the ground of distance or for other sufficient reason, he is unable to make this inspection himself, he should obtain and attach to the certificate of the cause of death a certificate signed by two persons, neighbours of the deceased, verifying the fact of death.

4. That medical practitioners should be required to send certificates of death to the registrar, instead of handing them to the representatives of the deceased.

5. That the form of certificate of death should be prescribed, and that in giving a certificate medical practitioners should be required to use such forms.

6. That it should be made a penal offence to bury or otherwise dispose of a body, except in time of epidemic, without an order from the registrar stating the place and mode of disposal, which order, after it has been acted upon, should be returned to the registrar who issued it.

7. That it should be made an offence to retain a dead body unburied or otherwise legally disposed of beyond a period not exceeding eight days, except by permission of a magistrate.

8. That the practice of burial in pits or common graves should be discontinued.

9. That still-births which have reached the stage of development of seven months should be registered upon the certificate of a registered practitioner, and that it should not be permitted to bury or otherwise dispose of the still-birth until an order for burial has been issued by the registrar.

10. That, subject always to the discretion of the Crown Office, the result of precognitions taken by Procurators Fiscal in Scotland, or the precognitions themselves, should be communicated to the representatives of the deceased when application is made for the same.

Another recommendation was, following the precedent of the Infectious Diseases (Notification) Act, 1889, that a fee of 2*s.* 6*d.* should be payable to a medical practitioner out of public funds on every death certificate issued by him.

The recommendations of this Committee were duly pigeon-holed in the Governmental archives, where they have reposed, unacted upon,

ever since. Several efforts have been made since that time to revive an interest in this subject, but these also proved abortive, largely owing to the belief that they had no interest for the Government. Whether the time has now arrived for a legislative interest to be manifested, remains to be seen.

Before proceeding further, it may be well at this stage to state the law in Great Britain and Ireland regarding, particularly, the certification of deaths.

England.—The law in England is contained in the following Acts of Parliament, viz.:

(1) The Registration Act, 1836 (6 & 7 Will. IV. c. 86); (2) Amending Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88).

S. 20, sub-s. 2 of the latter Act determines the duty of the medical practitioner who has attended during the last illness of any person. It is well to keep in mind that the prescribed form of certificate of death *does not require the practitioner to have personal knowledge* of the actual occurrence of the death, since he may, if he choose, introduce the words "as I am informed" into the certificate in relation to the statement that the person named therein died on a certain date.

The certificate of the practitioner must be given to a "qualified informant" of the death, who is under a penalty of £2 for neglect to deliver said certificate to the registrar within five days; and a caution is given on the form itself to all persons against accepting or using said certificate for any purpose except that of delivering it to the registrar. The persons qualified to be informants for registration and to whom only the certificate is to be given by the practitioner are as follow:

1. A relative of deceased present at the death. 2. A relative of deceased in attendance during the last illness. 3. A relative of deceased dwelling or being in the sub-district in which the death occurred. 4. A person "present at the death." 5. The "occupier" of the house in which the death took place. 6. An "inmate" of the house in which the death took place. 7. The person "who caused the body to be buried."

By s. 10 of the latter Act, the nearest relatives of deceased are required to be informants of deaths, and they incur a penalty of 40s. if they fail to comply with this law. It is not rigidly insisted, however, that the nearest relatives shall in all cases attend before the registrar; but, unless strong reasons for their non-attendance can be given, the duty of the registrar is to require that, if there are in the sub-district any relatives of deceased, either dwelling or being there for the time, some one of such relatives shall fulfil the legal obligation to sign the register book as informant. If no relative is available, then the register book may be signed by a person having one of the other legal qualifications.

Coroners' Inquests and Death Certification. The duties of a coroner in relation to death inquiries are defined in the Act of 4 Edw. I. c. 2, *De Officio Coronatoris*, and again in the Coroners Act, 1887, s. 3. It is the duty of a coroner to hold inquests on the bodies of persons who

die by violence, accidental or otherwise, on the bodies of those who die suddenly under suspicious circumstances, or of those who die in prison; and to do other things which are not cognate to our subject. He may make his inquiry either by himself or with a jury. After he has made his inquiry, or after a jury has returned a verdict, he must certify in accordance with the terms of s. 16 of the Act of 1874, which enact that he shall send to the registrar within five days after the finding of the jury has been given a certificate under his hand, giving information concerning the death and specifying the finding of the jury with respect to the particulars of the death, and to the cause of death.

Registrars are instructed by the Registrar-General, before registering, to report to the Coroner: 1. All deaths occasioned directly or indirectly by violence. 2. All deaths occurring under suspicious circumstances. 3. All deaths the cause of which is stated to be "unknown." 4. All deaths stated to have been "sudden," and respecting which no certificate issued by a medical practitioner is produced. 5. All deaths of infants in houses registered under the Infant life Protection Act, 1872 (now the Children Act [*v.p.*]).

In order to prevent the over-insurance of the lives of children and to remove temptation to commit the crime of neglect, Parliament has passed measures.

Under the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), Friendly Societies Amendment Act, 1876 (39 & 40 Vict. c. 32), application may be made to a registrar for a certificate or certificates for the purpose of obtaining moneys of insurance. S. 15, sub-s. 9 of the Act of 1875 deals with the sum chargeable by the registrar for one certificate, and s. 8 of the latter Act the sums to be paid for each certificate of death of the same death where more than one certificate is asked for or demanded. By s. 14 (2) it is enacted with respect to all "registered societies," whether Friendly or Benevolent, that—

> No Society shall pay any sum of money upon the death of a member or other person whose death is, or ought to be, entered in any Register of Deaths, except upon the production of a certificate of such death under the hand of the Registrar of Deaths or other person having the care of the Register of Deaths in which such death is or ought to be entered.

The form of application for a certificate of death of a child between five and ten years of age is determined by these previously mentioned Acts and the Trade Union Amendment Act, 1876 (39 & 40 Vict. c. 22). By this Act trade unions, whether registered or not, which insure or pay money on the deaths of children under ten years of age, are brought within the provisions of s. 28 of the Friendly Societies Act, 1875, by sub-s. (1) of which it is declared that—

> No Society shall insure or pay on the death of a child under ten years of age any sum of money which, added to any amount payable on the death of such child by any other Society, exceeds ten pounds,

and by sub-s. (2) that—

No Society shall pay any sum on the death of a child under ten years of age, except to the parent of such child, or to the personal representative of such parent, and upon the production by such parent or his personal representative of a certificate of death issued by the Registrar of Deaths or other person having the care of the Register of Deaths, containing the particulars after mentioned,

which, according to sub-s. 3, are enacted that—

Whenever a certificate of the death of a child is applied for, for the purpose of obtaining a sum of money from a Society, the name of such Society and the sum sought to be obtained therefrom shall be stated to the Registrar of Deaths, who shall write on or at the foot of such Certificate the words " to be produced to the *** Society "—naming the same—" said to be liable for the payment of the sum of *** "—naming the same; and all certificates of the same death shall be numbered in consecutive order; and the sum charged by the Registrar of Deaths for each such certificate shall not exceed one shilling.

Sub-s. 4 enacts that—

No Registrar of Deaths shall give one or more certificates of death for the payment in the whole of any sum of money exceeding £10 on the death of a child under ten years; and no such certificate shall be granted unless (1) the cause of death has been previously entered in the Register of Deaths on the certificate of a Coroner, or (2) of a registered medical practitioner who attended such deceased child during its last illness, or (3) except upon the production of a certificate of the probable cause of death under the hand of a registered medical practitioner, or (4) *of other satisfactory evidence of the same.*

Sub-s. 6 declares that it shall be an offence under this Act—

(*a*) if any Society pays money on the death of a child under ten years of age, otherwise than is provided for in this Act; (*b*) if any parent or personal representative of a parent claiming money on the death of a child produces any certificate of such death other than is herein provided to the Society or Societies from which the money is claimed, or produces a false certificate or one fraudulently obtained, or in any way attempts to defeat the provisions of this Act with respect to payments upon the deaths of children.

Sub-s. 1 of s. 28 of the same Act declares that—

No Society shall insure or pay on the death of a child under five years of age any sum of money which, added to any amount payable on the death of such child by any other Society, exceeds six Pounds.

The weakest part of sub-s. 4, italicised by us, exposes the provisions of the Act to risk, inasmuch as it depends upon the particular registrar as to what constitutes to his mind satisfactory evidence, since the Act gives him no guidance.

In order to prevent further the over-insurance of the lives of children, certain enactments were made in the Children Act, 1908 (8 Edw. VII. c. 67). Ss. 7 and 12, sub-ss. 5, 6 and 7 deal with this subject, s. 7 enacting that—

A person by whom an infant in respect of which notice is required to be given under this part of this Act is kept shall be deemed to have no interest in the life of the child for the purposes of the Life Insurance Act, 1774, and if any such person, directly or indirectly, insures or attempts to insure the life of such an infant, shall be guilty of an offence under this part of this Act, and if a company within the meaning of the Life Assurance Companies Acts, 1870–72, or any other company, society or person, knowingly issues or procures or attempts to procure, to be issued to or for the benefit of such a person on his behalf, a policy on the life of such an infant, the company, society or person shall be guilty of an offence under this part of this Act.

S. 12 deals with the punishment for cruelty to children and young persons (sub-s. 4). If, upon the trial of any person for the manslaughter of a child or young person of whom he had the custody, charge, or care, he is convicted on indictment or summarily (sub-s. 5), the sentence awarded may be made the more severe; and (sub-s. 6) a person

shall be deemed to be directly or indirectly interested in a sum of money under this section if he has any share in, or any benefit from, the payment of that money, though he is not a person to whom it is legally payable;

and (sub-s. 7) declares that a copy of a policy of insurance, certified by an officer or agent of the insurance company granting the policy to be a true copy, shall in any proceedings under this section be *prima facie* evidence of the insurance, and that the person in whose favour the policy has been granted is the person to whom the money thereby insured is legally payable. Part I of the Children Act, 1908, deals with Infant Life Protection, and repealed the Act of that title of 1897.

Scotland.—The law of certification and registration of deaths in Scotland is embraced in the following Acts:

1. Registration Act, 1854 (17 & 18 Vict. c. 80);
2. Births and Deaths Registration Act, 1855 (18 Vict. c. 29);
3. Amending Act of same title, 1860 (23 & 24 Vict. c. 85).

S. 4 of the original Act and s. 14 of the second Amending Act deal with the relation of the medical practitioner to the registrar respecting the certification of deaths, and are to the effect that the practitioner who attended the last illness of a deceased person shall be bound to transmit to the registrar, *within seven days* after the death, a certificate of the cause of death in the form prescribed under the Act; failing to do so, the registrar shall then forward to the practitioner a certificate form partly filled in, and by a printed or written requisition shall require him to return said certificate duly completed *within three days* after receipt thereof, under a penalty not exceeding 40s. in case of failure.

In cases which have been the subject of inquiry by a Procurator Fiscal, this official is bound under s. 40 of the original Act to inform the registrar of the result of his inquiry, but no time is defined in the Act within which such information is to be returned by him to the registrar. The Procurator Fiscal is charged with the duty of inquiring into the causes of sudden or suspicious deaths and of deaths by accident.

This inquiry may be either a private inquiry in the form of precognition (deposition) of witnesses, and by medical report, or it may be a public inquiry in certain cases, as in fatal accidents, and, in special circumstances, of sudden deaths. The causes of death in fatal accidents are inquired into under the Fatal Accidents Inquiry (Scotland) Act, 1895 (58 & 59 Vict. c. 36), or under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act, 1906 (6 Edw. VII. c. 35). The form of procedure is that the Procurator Fiscal presents a petition to the Sheriff of the jurisdiction craving him to hold a public inquiry in regard to the cause of death and the circumstances of the accident (Fatal Accidents Act, 1895, s. 3), and the Sheriff, in granting the petition, pronounces an order directing that a public inquiry be held, and grants warrant to cite witnesses and havers at the instance of the Procurator Fiscal. In the latter Act it is declared that " in any case of sudden or suspicious death in Scotland, the Lord Advocate may, whenever it appears to him to be expedient in the public interest, direct that a public inquiry into such death and the circumstances thereof be held," such inquiry to take place according to the forms and procedure prescribed by the former Act, except as in so far altered by the Act of 1906. In such cases the Sheriff publicly hears evidence along with a jury composed of seven members.

It is the duty of the Procurator Fiscal at the close of any such inquiry to transmit all the documents, including reports or productions, with a copy of the verdict of the jury " together with the usual schedule for the registrar of deaths," to the Crown Agent, Edinburgh.

Deaths of prisoners in prisons in Scotland are inquired into by the Sheriff of the jurisdiction under the Prisons (Scotland) Act, 1877. In this Act the inquiry is called an *inquest*, the only Scottish Act in which this word is used.

Law of Certification for Cremation.—The Cremation Act, 1902 (2 Edw. VII. c. 8), which applies to England and Wales and Scotland, but not to Ireland, deals with the law respecting the manner of disposal of dead bodies by fire. Since fire is calculated to destroy all evidences of foul play, even by poisoning, the certification of death demanded is of a more searching character than that needed for inhumation or ordinary burial. The Cremation Act, therefore, demands two certificates of death ; one to be provided by the ordinary medical attendant of the deceased person, called the statutory medical certificate, and the second, given under the hand of a registered medical practitioner of not less than five years' standing, called the confirmatory certificate. These certificates, together with a statement of facts by the nearest relative, are placed before the medical referee or deputy medical referee of the cremation authority in whose premises the cremation is to be conducted, appointed by said authority and approved in England by the Home Secretary, and in Scotland by the Secretary for Scotland, who shall consider the sufficiency of said certificates, and,

if deemed satisfactory, the cremation is permitted to take place. If, however, these certificates are not considered satisfactory by him, he may refer them back to their grantors for further information or to be filled in proper form. Where the death has not been definitively ascertained by the certifying doctors, the referee may require that a *post-mortem* dissection of the body be made by a medical expert in pathology. The Home Secretary was authorised under this Act to make regulations for cremation purposes, and these have been in operation since March 31, 1903. No regulations for Scotland have, however, been issued by the Secretary for Scotland up till the present time, but proceedings for cremation in Scotland are conducted in accordance with the letter and spirit of the English regulations. These regulations declare (1) that no cremation of human remains shall take place except in a crematorium of the opening of which notice has been given to the Secretary of State; (2) that it shall not be lawful to cremate the remains of any person who is known to have left a written statement or direction to the contrary; (3) the application for cremation must be made by an executor or nearest surviving relative of deceased, or, if made by any other person, satisfactory reason must be given why such application was not made by such executor or relative; (4) after due certification of the death by two medical practitioners on different forms, a medical referee shall not allow any cremation to take place (*a*) if it appears that deceased left a written declaration to the contrary, (*b*) unless he is satisfied that the death has been duly registered by the production of a "certificate of registry of death" on the proper form, (*c*) unless application has been duly made as already mentioned, (*d*) unless he is satisfied that the fact and cause of death have been definitely ascertained, and (*e*) if the cause of death designed in the certificates be such as might have followed from an illegal operation, privation or neglect, or to poison, to violence, or, indeed, if there be any suspicious circumstances, he shall not allow the cremation to proceed unless a *post-mortem* dissection of the body be made by some person of skill. The English regulations also indicate the medical persons who may be appointed as medical referees.

From an experience as medical referee to a cremation authority for several years, it may be stated that very scrupulous care is exercised in scrutinising certificates of death given for the purpose of having a body cremated.

Ireland.—The law operating in Ireland concerning certification of deaths is contained in the following Acts:

1. Registration of Births and Deaths (Ireland) Act, 1863 (26 Vict. c. 11).

2. The amending Act of like title, 1880 (43 & 44 Vict. c. 13).

Under the former Act it was the duty of the medical practitioner who had been in attendance during the last illness of a deceased person, after December 31, 1863, to transmit *within seven days* after the death of

such person to the registrar of the district in which the death took place a certificate of the cause of death in the form prescribed under the Act, and, in case such certificate should not be so transmitted, the registrar should send to said practitioner a form of such certificate, and by a printed or written requisition under his hand should require such practitioner forthwith to return the same to him duly filled up, and such practitioner was required *within three days* after the receipt thereof to return such certificate duly completed to such registrar. It will be noted that under that Act the conditions were precisely the same as those which now are in operation in Scotland.

Under the later Act of 1880, s. 20, however, the conditions were changed to be in accordance with the procedure contained in the Acts for England, in respect that it enacts (1) that the practitioner must give a certificate of the cause of death if he has been in attendance during the last illness of a deceased person, (2) must give said certificate to a " qualified informant " who, in turn, must convey said certificate to the registrar *within five days of its receipt* under a penalty. In these respects, therefore, the present law in Ireland is identical with that in England.

With regard to the action of the coroner in Ireland, ss. 17 and 20 of the Act of 1880 apply, and these are practically identical with those for the coroner under the English Acts.

Having now considered the law in operation in the United Kingdom, it may be well to set down some facts regarding the manner of certifying deaths in some foreign countries. This will permit more readily of comparison and contrast with home methods.

Germany and Berlin.—The principal particulars required in a death certificate in the city of Berlin given by a physician or surgeon are as follow: Christian and surname of deceased; address of home and where death took place if away from home; number of rooms in dwelling; number of inmates in house, including deceased; how long deceased had lived in Berlin; age of deceased; date of birth; if deceased is married, age of surviving spouse; day and hour of death; signature of physician or surgeon who treated deceased or who has seen the body; whether or not deceased was personally known to the doctor, or by whom body was identified; certain signs of death visible on body; name and duration of illness; if death of an infant under one year, how nourished; if any signs of injury on body, and if so, what signs; was illness infectious or not; if so, what measures were taken to prevent spread of infection; if and what means of resuscitation were employed in suitable cases.

France.—Within a few hours after death the nearest relative, accompanied by two witnesses, proceeds to the mairie of the district and gives notice of the death. The mayor issues a Form, No. 1, indicating that such notice, with particulars, has been received, and he delegates a doctor, who is named, to go to the house therein mentioned

and there to be shown the dead body to prove the death and to indicate the cause. This doctor is known as the Médecin Vérificateur, and on this duty is a Doctor of the Civil State. This doctor visits the house, in virtue of the foregoing order, and certifies in Form No. 2 that he has visited the corpse named in the order and has proved and gathered on the spot information, *inter alia*, regarding the day and hour of the death. He also makes a note whether or not the dwelling is in a sanitary condition. In certain cases he can order the use of an " urgency coffin." The verifying doctor must also, on Form No. 3, and at the time of his visit to the house of deceased, fill an " impersonal statistical notice," in which full particulars are given concerning the deceased as to (*a*) his civil state, (*b*) date of death, (*c*) residence, (*d*) relation to the married state, (*e*) calling or occupation, (*f*) vaccinated or not, and, in the case of infants, (*g*) other cognate particulars. Facts are likewise to be given respecting the death if of a still-born child or an infant dying before the registration of its birth.

If the death be found due to natural causes the verifying doctor sends his report to the mairie and an order for burial is thereupon issued. If, however, he has doubts regarding the cause of death, he reports accordingly to the mairie, and the judges' bench, to whom such report is forwarded, order through the Procureur de la République a thorough examination of the body by a pathological expert.

Belgium and City of Brussels.—The procedure in Belgium is even more elaborate. The Minister of the Civil State issues from time to time instructions for medical practitioners who are delegated by him to verify births and deaths at the dwellings of the people. The last of these instructions known to the writer are dated January 1, 1889. From these, it appears that the Medical Service of the Civil State is distributed amongst divisional doctors under and auxiliary to the Division of Hygiene, and the supervision and direction of this service is under the Chief Inspector of the Division of Hygiene. When engaged in the work of verification the divisional doctors take the title of " Doctor of the Civil State," and when so engaged they must strictly conform to the instructions given and observe the regulations and recommendations therein given.

No interment may take place unless the death is certified to the doctor of the Civil State after complete and attentive examination of the corpse. This verification, as well as the identity of the deceased person, is certified by an official document, which is left at the house of deceased. If the condition of the body present any indication of death from violence or other suspicious circumstances, the doctor must give notice in writing at once to the Officer of the Civil State as well as to the Divisional Police charged to hold an inquest prescribed by Art. 18 of the Civil Code. The doctor shall transmit to the police at the same time the certificate of verification of the death, notifying that permission to bury the body must not be given without the authority of the

police and inform the person whose duty it is to make the declaration of death of such notice having been given. Where the deceased is a person not resident in Brussels, having been admitted through urgency to a hospital or to the house of an inhabitant, the notice and certificate by the verifying doctor are sent to the Officer of the Civil State, who, in turn, transmits them to the King's Attorney. He signifies to the Officer of the Civil State and to the Divisional Police the infractions of regulations and depositions which forbid the proceeding to embalming or putting into the coffin of the body until the death has been verified. The verification of the death of the still-born or newly-born infant requires even a more careful examination of the facts by the verifying doctor, but details need not be given here.

In case of epidemics, when the removal of bodies is carried out generally, and at all times when the public health or the circumstances of the family demand, the doctor is to order the transfer of the body to a communal mortuary named in the Instructions. To this end he delivers a requisition in two parts, one addressed to the inspector of police of the division, or to the officer of interments, to proceed to remove the body of deceased person at once, and the other is to be attached to the clothes or winding-sheet of the body to be sent to the mortuary. When he discovers in verifying the cause of death that death was due to epidemic, contagious, or infectious disease, he, in conjunction with the Chief Inspector of the Division of Hygiene, is to prescribe all the measures to be taken demanded by the public health. Disinfection is under the care of special agents of the Division of Hygiene. The medical treatment of any deceased person is not to be the subject of criticism by the verifying doctor.

It is necessary to produce for annexation to the certificate of verification the medical declaration signed by the medical practitioner who treated the deceased or who assisted at the confinement of the mother where there has been a still-birth.

If the doctor in attendance has reasons for leaving the parents in ignorance of the cause of death of deceased, the doctor of the Civil State ratifies and confirms the diagnosis of the cause of death, and this ratified declaration is sent direct by him to the Chief Inspector of the Division of Hygiene. Should a doctor of the Civil State himself have been the doctor in attendance on deceased or have conducted the confinement in a case of still-birth, he must pass on the further examination of the facts to his deputy, indicating his inability to act and inviting him to act in accordance with the instructions already given. A doctor of the Civil State is not only punishable if he neglects to perform faithfully his duties, but he is also to take precautions that his deputy does not neglect such duties when called upon, or infringe the instructions.

Save in those cases in which there are marks of violence on the body and where the police have been informed that their intervention is needed, the doctors, after verifying and proving true their certificates,

duly filled up, shall give them to the persons charged to make the declaration to the Civil State—that is, the relatives—and they are to invite them to go without delay to the Hôtel de Ville for that purpose, calling their attention particularly to the paragraphs in the directions and to questions in the certificates, and insist on their producing documents to establish the identity and verify the domicile of the deceased, since in default of such documents the declaration must be made by the parents, friends, or neighbours, as the case may be. Following upon this, and immediately after the verification of the death, two male witnesses of at least twenty-one years of age, and most nearly related to deceased or the person who was with the deceased, accompanied by a relative or another, must proceed to the Hôtel de Ville, furnished with the certificate. According to the police regulations, no burial may take place until twenty-four hours after the death, and in conformity with the directions given by the overseer of burials, whose duty it is to visit the house and affix the number on the winding-sheet.

In the certificate of verification, the appointed doctor of the Civil State certifies that he has personally verified the decease and the identity of the person described, and at the same time that the doctor who attended deceased during his last illness was called in to give his attention to the deceased person as he certifies in an accompanying certificate.

These illustrations of the procedure in foreign countries will suffice to indicate essential differences between Great Britain and them.

Medical Certificate.—We turn now our attention to Medical Certificates of Deaths themselves.

In Great Britain, not differentiating for the moment between any one part of it compared with the others, it will be found that the prescribed form of certificate contains certain points worthy of consideration.

The certificate is addressed to the registrar of the district in which the death took place, and reads as follows:

I hereby certify that I attended ————, who died on the—— day of ———, 192–, at ————, that I last saw the Deceased on the —— day of ———, 192–, and that the Cause of Death and Duration of Disease were as under-noted:

Cause of Death	Duration of Disease		
	Years	Months	Days
Primary Disease (*a*)			
Secondary Disease (if any) (*b*)			
(*c*)			
(*d*)			

Witness my hand, this —— day of ————, 192–. Signature ————
Professional Title ————
Residence ————

This Certificate is intended solely for the use of the Registrar of Births, Deaths, and Marriages, and the Registrar-General cautions all persons against accepting or using his Certificate for any other purpose.

It will be noted that the certificate purports to be given by a doctor who has attended the deceased person, and the phrase used " that I last saw the deceased " presumes that the doctor saw the deceased, while ill, more than once. There is considerable elasticity amongst medical practitioners regarding the interpretation of what constitutes " attendance," and there can be no doubt whatever that certificates of death are sometimes given where the doctor has seen the patient only once, and that some time prior to the decease. As the Select Committee say in their Report (p. xvii)—

> It is obvious that a medical man who has only seen a case at some more or less remote date, and has not been in attendance immediately preceding death, can have no such knowledge of the circumstances of the case as to justify him in giving a certificate of the cause of death (and regarding the interpretation of attendance during the last illness) ; that should be defined as meaning personal attendance upon at least two occasions, one of which should be within eight days of death.

A most important omission, in our opinion, in the prescribed form of certificate is the absence of any obligation by the medical practitioner to have personal knowledge of the actual occurrence of a death. As a matter of fact the possibility of his being able to introduce into his certificate, regarding such occurrence, the words " as I am informed " lays such certificates open to suspicion. It is well known that the absence of personal verification by the doctor of the actual occurrence of the death certified may make the doctor and the public the victims of fraud. Based upon the evidence given before the Select Committee, the Committee (p. xiii), expressed themselves thus :

> It is obviously possible, under the procedure described, for persons who have an object in so doing, to inform a medical man that a person whom he has been attending has died, when such is not the case, and to obtain a certificate of the cause of death based upon the medical man's previous knowledge of the case.

We mentioned one case of this kind before the Committee, and other witnesses were able to do the same. Such a condition of matters should no longer be permitted, since it gives an opening for not only offences against the law of Certification and Registration being committed, but also much more serious crimes.

The following is, probably, one of the best examples which could be adduced: On February 20, 1918, two women, one aged nineteen years and the other much older, were charged at the High Court of Justiciary, Edinburgh, on indictment which gave details of a daring series of frauds on assurance companies extending over nearly six years. The charges against them were, that they formed a scheme to obtain money from assurance companies by effecting assurances on the lives of certain persons real and fictitious. They pretended to the companies that the assured persons had died, and thus obtained the moneys payable on the policies. The frauds ranged over a period from February

1912 to August 1917. The mode by which the elder woman effected these frauds was this—she, in most cases, insured the life of a child and waited till the insurance had matured. She used then to take the child to a doctor and tell him that the child was suffering from bronchitis or pneumonia or some other ailment, and got a prescription from the doctor. Later, she would return to the doctor, tell him the child had died, and obtain a death certificate in the name of the person she had insured. This certificate was presented to the registrar, and, armed with this or with the suitable extract, accused obtained payment from the assurance company. She had done this successfully on about twenty-four different occasions in Glasgow and other towns in the west of Scotland, and had drawn moneys amounting to between £200 and £300. The elder prisoner had been convicted in Ireland of a charge of a similar nature. The Lord Justice-General inquired how the same doctor came to give several certificates, and the Advocate Depute informed the Court that there seemed to be nothing in the Act—Births and Deaths Registration Act—to prevent a doctor giving a certificate of death where he had not seen the body, but respectable doctors mostly refused to give a certificate unless they had seen it. The matter had been brought to the notice of the Registrar-General, and an amendment would probably be effected in the Act. The elder woman was convicted and was sentenced to seven years' penal servitude, and the younger woman, whom the Court, from the evidence, believed to be a tool merely of the former, to eighteen months' imprisonment.

It is not necessary to make much comment upon a state of the law which renders it possible for such affairs to happen as has been revealed in the foregoing facts ; it is probably enough to say that much more grave consequences may happen. It is perfectly clear that if the law were that a doctor, before certifying, must himself verify the fact that the death he is asked to certify has really taken place, such cases as the foregoing could never take place, unless the doctor himself were participant in the frauds themselves.

We have long held the opinion that verification of every death should be made by the doctor before he certifies that the death has actually occurred, and prior to his writing the certificate. The Select Committee, indeed, on this point were most explicit in their recommendation :

> Your Committee are of opinion, after consideration of the evidence bearing on the question, that in every case of death in which a medical practitioner has been in attendance he should be required to certify not only to the cause but also to the fact of death. Before giving the certificate he should be required to personally inspect the body, except in cases where, on the ground of distance, or other sufficient reason, he is unable to make such inspection. He should, however, before issuing a certificate, in such cases be furnished with a certificate signed by two persons, neighbours of the deceased, one of whom should be a householder, verifying the fact of death. He should also append to the certificate given in such a case a statement

of the reasons which have prevented him making a personal inspection of the body. It would be desirable that persons certifying to the fact of death in cases in which a medical man is unable to do so should be subjected to the same penalties for giving false certificates as persons falsely attesting marriage certificates.

If the law were to be amended in this direction and the duty of verification of death made obligatory on the medical practitioner, it would not be reasonable, however, to place this additional burden upon him without remunerating him for its performance. It is to be remembered that the duty of death certification has been placed statutorily on the doctor and that no fee is given him for doing so. There has not been any recent obligation of certification for which a fee has not been given, as, for example, the notification of cases of infectious disease which are notifiable.

Turning once more to the prescribed terms of the Death Certificate, one notes the use of the expressions " primary " and " secondary " to the diseases causative of the death. These terms have long been a cause of confusion, especially among young practitioners, and even among older practitioners because of their ambiguous meaning. This was brought before the Select Committee in the evidence of various witnesses, and in their Report (p. xvii) they dealt with the subject as follows:

It appears that there is some confusion in the minds of medical men as to the meaning to be attached to the words " primary " and " secondary " in the space provided in the form for setting forth the cause of death. The words are interpreted by some as meaning the " primary cause chronologically, and by others as the primary cause physically of death." The forms are filled up in accordance with these different interpretations. The result of this is that, in many instances, the certificate does not give correct information as to the cause of death, and it is difficult for a person, from mere inspection of the certificate and without having seen the patient, to say what was the immediate cause of death. Your Committee are of opinion that it is desirable that the words " primary " and " secondary " should either be omitted from the form as leading to confusion in stating the cause of death, or that they should be defined in a footnote as meaning the order of the development of the diseases as they occurred. In the event of the entire omission of the words, some other terms should be substituted so as to secure the declaration in all cases of associated diseases or associated traumatic conditions.

In books of forms of death certificates issued by the Registrar-General for Scotland some years ago, such an explanation was printed as follows:

The medical attendant will have the goodness to state the *primary*, and only the important *secondary*, diseases, with the time between the attacks and the death, in hours, days, or years. Example: Measles, 9 days, Bronchitis, 3 days. By this it is to be understood that the first symptoms of measles appeared nine days before death, the first symptoms of bronchitis three days. He will add P.M. when a *post-mortem* inspection has taken place.

In the instructions issued more recently and in operation now, these explanatory words have been omitted and the following is what is printed:

> The essential of a Medical Certificate of Death is a statement of the disease, or violent or unnatural cause, which was *primarily responsible* for the death, or which, in other words, initiated the train of events leading to death, and under no circumstances should that essential be omitted. Secondary or contributory causes are frequently of great value for statistical purposes, and should be added to the certificate, but in no case should they be stated to the exclusion of the primary cause. The *terminal condition*, or mode of death is not asked for in the certificate, and should never be given. For this reason terms such as "Heart Failure," "Syncope," "Asphyxia," "Exhaustion," and the like, should never appear in a certificate.

From these explanations it seems clear that the desire of the Registrar-General is a certification of the causes of death in the chronological order of their appearance.

In the same book of forms is given a list of "Terms which are indefinite or undesirable for purposes of Medical Certificates" and an "International Classification of Causes of Death as adopted by the Registrar-General for Scotland." If reasonable attention be given to these lists by any certifying practitioner when signing a death certificate, little difficulty in classification need arise.

Death Certificates for International Purposes.—This raises the question of death certification for international purposes. It would appear as if nearly all civilised nations were using a uniform nosology or systematic classification of diseases from which deaths result, but the forms of certificates and the regulations governing their filling up are different among the nations. Because of this, much difficulty is necessarily experienced in comparing the statistics of deaths of one nation with those of another. If international statistics are to become of any value, a common ground must be found in respect of (*a*) nosology, and (*b*) form of certificate. What, generally, are the terms of certificates employed by different countries of the world for statistical purposes? Germany, France, Japan, and Belgium, for example, ask the medical certifier to give the cause of death, whether from accident or disease, without demanding any information regarding secondary or complicating or intercurrent or supervening diseases. Indeed, it would seem as if Japan implicitly discouraged the giving of any secondary cause of death, placing upon the practitioner the whole responsibility of selecting and naming the cause which, in his opinion, was the actual cause of death. On the other hand, some nations, as Great Britain, the United States of America, Italy and Sweden, require a primary—or principal, primitive, or actual, or first or chief—cause, and also a secondary—or concurrent or contributory or complicating—cause; and some other nations and provinces, as Switzerland, Queensland, some American States and cities,

add a third cause, viz. a final or terminal or immediate cause of death.

With respect, also, to the duration of disease causative of death, the practice of different countries varies. Thus France only asks whether the disease is acute or chronic, whereas Germany, Sweden, Switzerland, and Italy do not ask any question at all as to duration. New Zealand and Victoria desire to be informed as to " time from attack till death," while Japan wants to know the date when the disease commenced. The duration of diseases causative of death seems to be desirable for classification statistical purposes. Sweden deals with the classification in a different manner from any other country. In that country the certifying practitioner is requested to give in the certificate the classification or list number of the primary disease causative of death as well as its name, but the same is not required for the secondary disease.

For purposes of international statistics, two things seem to be essential, viz.

1. A uniform nosology or systematised classification of diseases; and

2. A simple uniform form of medical certificate of death, the terms of which would be self-explanatory.

To my mind it is doubtful if the duration of the disease is of so much consequence as the proper designation of the cause or causes of death. It is to be borne in mind that a practitioner may not be in a position, nay, is very frequently quite unable, to state of his own personal knowledge the duration of chronic illnesses which assist to terminate life, because of the intervention of some acuter phase of the same disease or of a new or consequential disease. The tidal movement of doctors and patients has to be borne in mind, especially among the poorer or even the insured classes under the National Health Insurance Act. Mere guesses, therefore, of duration in such circumstances are of no value for statistical purposes; indeed, if and when given, they are at best but delusive guides to the real facts. It is of importance that in any amended form of death certificate which may be employed for international purposes, that as at present the international classification of causes of deaths should form part of the certificate book issued to practitioners, preferably numbered as to each disease for easy statistical classification.

The time is more than fully ripe for amendment of the law respecting death certification and registration in this country, and if the amended law can be so framed that certificates issued under it are comparable to those of other countries, much assistance will be afforded to those who are interested in the conditions of the public health of the world.

THE LAW OF STATUS IN NEW ZEALAND.

[*Contributed by the* Hon. Mr. Justice Chapman.]

The Legislature of the Dominion of New Zealand has probably plunged further into the experimental region in what may for convenience be called the law of status than that of any other British Dominion. It is not in this direction alone that it has shown a disposition to break with tradition. Its labour laws, including the establishment of a Court for compulsory Industrial Arbitration, its Public Trust Office, its Government Life Insurance, State Fire Insurance and State Coal Mines, its Female Franchise, its "one man one roll" electoral law, its extensive policy of purchasing and subdividing great estates, resulting in a very marked way in creating a new yeomanry, its system of lending money for improvement of land, are now all fairly old institutions and have found many imitators. These, however, do not in any marked degree affect the status of the subject, save in so far as the fixing of a minimum wage and other conditions affects the right to make contracts. In this respect, however, such laws are not essentially different from Factory Acts.

Marriage.—In the law of status experiments have been tried, or, I should say, initiated, for the trial must come later, which are beneficial in intention and, it is to be hoped, will prove beneficial in effect. No substantial change has been made in the marriage laws beyond the widely adopted rule allowing marriage with the deceased wife's sister save that this has been extended to the case of deceased husband's brother. Such marriages remain, however, rare. Parliament has even considered and allowed the remote case of marriage with deceased wife's niece, and the still remoter case of the deceased husband's nephew. Somewhat inconsistently it has, while recognising the propriety of such marriages, limited its activity in this direction to legalising marriages effected prior to a certain date.

Divorce.—With respect to the law of divorce the main alteration is in the direction of allowing desertion for three years, cruelty, habitual drunkenness, and permanent insanity as causes for dissolution. These extensions, with slight variations, are common to most of the States of Australasia. Further divorce legislation in the direction of extending the definition of desertion was passed in November 1920, but such details are of local rather than of general interest. Until the disturbing, and it is hoped temporary, conditions due to the war set in, the commonest case tried was that of a woman suing on account of desertion for five years, which is unfortunately of very frequent occurrence in New Zealand and probably in Australia. The period was reduced recently from five to three years.[1] It is scarcely necessary to

[1] An Act of 1919 also makes special provision for the desertion by persons of enemy origin of their New Zealand wives and for the guardianship of the children of such marriages. In addition it brings into force with reference to New Zealand "The Matrimonial Causes (Dominion Troops) Act, 1919."

say that as to adultery and all other matrimonial offences there is equality of right between the sexes.

There is, however, one important legislative step which may some day come into question. Up to a certain point colonial Courts seem to have acted on the assumption that the ruling in *Niboyet* v. *Niboyet* 4 *P.D.* 1 gave them jurisdiction to dissolve marriages irrespective of domicile. The matter was probably seldom questioned until the judgment of the Privy Council in *Le Mesurier* v. *Le Mesurier* 1895 *A.C.* 517 showed our Courts where the limits must necessarily be. Even without considering whether in this respect there is a difference between the legislation of the Imperial Parliament and that of a Dominion it is obvious that it is impossible now for Courts in the Dominions to rely on *Niboyet* v. *Niboyet*, and it seems that the current of judicial opinion is such that it would not now be acted on in a contested case in England. *Sinclair's Divorce Bill* 1897 *A.C.* 469. *Malone's Divorce* (*Valid Action*) *Bill* 1905 *A.C.* 314.

Domicile.—The Legislature of this Dominion has, however, revolted as far as it can against the doctrine that a husband drags his wife into whatever domicile he chooses to adopt. Endless trouble and distress has arisen out of this doctrine, but naturally the Courts were never able to find a remedy. The Legislature, however, has endeavoured to find one by declaring that a deserted wife may claim to have retained her New Zealand domicile. It is obvious that this does not cover the whole ground of the grievances of deserted wives resident in the Dominion and that it may in remote and improbable cases give rise to several collateral questions.

For instance, a wife may by marriage have acquired a New Zealand domicile without ever having been in that Dominion, or she may have been deserted before her husband had actually acquired a domicile, though living with his wife in the Dominion. Apart, however, from incidental questions thus arising is the important central question as to the effect of this law. If the deserting husband has acquired a domicile in some other State and the wife has obtained a valid divorce in New Zealand, what is the status of the husband? The Court of Appeal of New Zealand in *Poingdestre* v. *Poingdestre* 28 *N.Z.L.R.* 604 has decided that this legislation is *intra vires* and that the deserted wife may obtain a divorce, but the question remains open whether the Courts of other States would respect this judgment. Presumably they could not, but it may equally be presumed that the Courts of the Dominion will at all times assert that the Legislature, with power to make laws for the peace, order and good government of the Dominion, and legislating for persons within the Dominion, has power to declare that within the limits of its authority and the geographical jurisdiction of its Courts, a woman who has obtained such a decree is an unmarried woman. There is an obvious danger in the position, but the risk is of rare occurrence. Such enactments are not confined to New Zealand.

The assumption made by the Legislatures in the Courts of many of the States of the American Union apparently is that the State Court may divorce any parties who happen to be within its local jurisdiction, and the Court of one State at least grants divorces in default of plea or answer to women whose husbands have never been in America, but in these States the whole subject seems to be treated in a loose and confused manner, and their Courts certainly have not found conscious imitators in Australasia.

One incidental matter that has attracted the attention of the Courts is the case of a married man coming to New Zealand while his wife remains in England until he has saved enough money to start a home. Instances have occurred where such men have become *bona fide* colonists before hearing that the wife has committed a matrimonial offence. A domicile having been acquired in New Zealand, the Courts of that country alone have jurisdiction to dissolve the marriage. In such cases special precautions have been taken to ensure that the wife's expenses are secured, should she be advised to defend. This subject of a man dragging his wife after him whenever he chooses to desert her and change his domicile, received the attention of our Legislature in 1919.

Legitimation.—The Dominion Parliament has dealt with the subject of Legitimation. Long before it did so it legislated in the direction of succession of illegitimates to the mother's property. This has occasionally proved very beneficial legislation. A mother is declared to be the next-of-kin of her illegitimate child who dies unmarried and without issue. If the illegitimate, being a male, leaves a widow and no issue the widow and the mother share equally. Further, an illegitimate child succeeds to the property of his mother provided that he does not come into competition with legitimate issue. It results that where there are several illegitimates who survive the mother, and one dies intestate, her illegitimate children, provided there are no legitimate competitors, succeed to the property of the deceased. It is obvious that this legislation leaves room for improvement. Once a Legislature recognises the rights of illegitimates on a humanitarian basis, it seems capricious to make their succession depend on whether there are legitimate competitors.

Incidentally I should mention that the law of distribution is nearly the same in New Zealand as in England, but real property becomes assets in the hands of the administrators to be distributed in the same manner as personalty.

In virtue of "The Legitimation Act, 1908," when the parents of an illegitimate child inter-marry, the father may legitimate the child; the mother has no voice in the matter. The Act provides that nothing in it shall have the effect of legitimating any child if at the time of its birth there existed any legal impediment to the inter-marriage of the parents. This does not quite carry out the apparent intention of excluding all adulterine children.

The power extends to children who are already dead. This led in one instance at least to a singular result. A couple married after the birth of their child. The child grew up to manhood, amassed considerable property and died unmarried and intestate. In the ordinary course the property would have gone to the mother, but the father promptly intercepted this by legitimising his dead son. It is difficult to see what there was to prevent this, but the parties agreed to divide the property.

Adoption.—By a simple process an order for the adoption of a child may be obtained from a Magistrate under "The Infants Act, 1908." Necessary precautions limit this by enacting that an order for the adoption of a female child may be made on the application of:

(*a*) Husband and wife jointly; (*b*) a married woman alone with her husband's written consent; (*c*) an unmarried woman at least eighteen years older than the child; (*d*) an unmarried man forty years older than the child.

In the case of a male child similar precautions are enacted with the like disparity of ages where the sexes differ. An adopted child must be under the age of fifteen. No premium can be received without the consent of the Court.

The Act contains explicit provision as to the status of the child. The order of adoption confers on it the name of the adopting parent in addition to the proper name of the child—

and the adopted child shall for all purposes civil and criminal and as regards all legal and equitable liabilities, rights, benefits, privileges and consequences of the natural relation of parent and child be deemed in law to be the child born in lawful wedlock of the adopting parent.

There are some exceptions which need not be set out as they are of no general interest, such as the exclusion of property devolving under certain instruments.

The statute goes on to declare that—

the adopting parent shall for all purposes civil, criminal or otherwise be deemed in law to be the parent of such adopted child and be subject to all liabilities affecting such child as if such child had been born to such adopting parent in lawful wedlock; and such adopting order shall thereby terminate all the rights and legal responsibilities and incidents existing between the child and his natural parents, except the right of the child to take property as heir or next-of-kin of his natural parents directly or by right of representation.

There are other provisions, such as those giving power to rescind such an order and power to adopt a child on behalf of a benevolent or other institution, which need not be further noticed.

The power to make similar orders is in the case of Maoris vested, though not exclusively vested, in the Native Land Court, a special tribunal for dealing with succession to partition of an alienation of lands of natives, probate of native wills, etc., etc. It has recently been

decided that these are concurrent powers. There is no novelty in adoption so far as natives are concerned, as it coincides with ancient Polynesian custom.

The Adoption of Children Act has seldom come before the Courts for interpretation, though it is manifest that several serious questions as to its effect may arise. It has, however, been decided on the construction of the Act that an illicit connexion between the son and the adopted daughter of an adopting parent constitutes the crime of incest created by the Crimes Act of the Dominion.

Wives and children in New Zealand have rights and privileges unknown to English law. Where a testator does not make adequate provision for their maintenance and support, the Court has power to do so under "The Family Protection Act, 1908." This has proved a slight but really necessary invasion of the plenary power to dispose of property by will. Its scope may be gathered from *Allardice* v. *Allardice* 1911 *A.C.* 730. This is the only legislative invasion, so far as European colonists are concerned, of the plenary testamentary power of the owner of property, and it has proved highly beneficial. There can be no doubt that its provisions extend to relations created by adoption.

In enacting the law of adoption the Legislature has not looked beyond its immediate surroundings and the needs of the population for which it professed to legislate. This method leaves open possible questions which, however remote and unlikely to arise, naturally come within the vision of the lawyer, if not of the legislator, thus:

Suppose the case of wayfarers travelling in New Zealand taking a fancy to a child and adopting it. The magistrate would presumably raise no question of domicile if everything pointed to an improvement in the child's position. What would be the status of the child (*a*) in the eyes of the Courts of the adopting parents' country, or (*b*) of this country? They might return to their own country and die intestate, leaving property in both countries. The answer to question (*a*) might be simple, and that to (*b*) more difficult. The mere change of domicile by settling in another country after the adoption might give rise to another set of questions. These questions assume that the parties are British subjects, but adoption may be, and at times is, effected by foreigners residing in New Zealand. I can only say that in that case the questions might prove still more difficult.

Then questions of detail may arise which have not been explicitly provided for. I will not attempt to exhaust these, but will indicate a few, thus:

1. Can a man adopt his, or a woman her, own child? The question might arise where adoption appeared to be preferable to legitimation or where an adulterine child had to be considered. It might also arise where a step-parent was willing to give the child of his or her spouse the status of adopted child.

2. Can the natural parents adopt their own child which had been

previously adopted by others? Peculiar questions might arise as to the status of the child.

3. Can grandparents adopt, and thus promote, a grandchild? If so, the child might in some cases be found to have a peculiar double status, *e.g.* in case of succession *per stirpes*.

4. Awkward questions already arise as to whether a Maori can adopt a child of European parentage. These have been as to the future settled by legislation. On the construction of the Act in force before this was forbidden, the Privy Council has decided that there was nothing to prevent a Maori doing so. *Arani* v. *The Public Trustee of New Zealand*, [1920] A. C. 198.

Native Race.—Europeanisation.—Though it has been necessary to enact some measures to protect the natives from being imposed on with respect to their dealings with land, the Courts have recognised that a Maori has the capacity of a contracting party, and have enforced contracts fairly entered into by judgment for specific performance. This is now subject to contracts entered into since 1909 to the very strict law as to confirmation.

This and other circumstances show that he is recognised as being a person of far superior status to the "savages" and "Blacks" of other Dominions. Long before the introduction of a general system of public education into England, that is to say fully sixty years ago, a higher proportion of Maoris than of Englishmen could read and write. The weak point of his position was that it suited the missionaries to make his education almost entirely Maori. In those days European settlers in the Maori districts treated it as a matter of course that they should learn the Maori language. The long wars between certain tribes and the Government, lasting with intermissions from 1860 to 1870, brought the missionary's influence to an end, and there was again an interval when the Maoris had little chance of education, until the State School system was introduced into districts where the native population was numerous.

For more than fifty years the Maori race has been represented in the elected Parliament by four members, and has always had a fair measure of representation in the nominated Legislative Council. The four represented more than a full share when the population was one-third of what it is now, but nobody complains of the over-representation. The suffrage is exercised by open voting in place of the ballot.

A Maori criminal has the right to claim to be tried by a mixed jury; the claim is in fact never exercised.

Excepting the Parliamentary representation and certain restrictions with reference to his dealings with his land, these differences are quite unimportant and leave his status as a subject standing on the same footing as a colonist unimpaired.

Ever since the foundation of the Colony the Legislature has been called upon from time to time to deal with the question of acquisition

of native lands. There have been many fluctuations in the laws touching such questions as to whether the Crown should retain or abandon its right of pre-emption of native tribal lands. Originally the land was tribal property, and from the first it was treated by the Colonial Government as the property of the native tribe, or sub-tribe (*hapu*), though an individual might occupy a part. In the course of time many tribal disputes were settled by the Native Land Court and titles to land were ascertained and Crown grants issued to individuals or to groups as tenants in common. These grants resulted in English titles to freehold land, but when there were many names on the Crown Grant the proportion owned by an individual might be very small, perhaps one-eightieth, or less, of the whole. While these titles were brought into line with the general law, the power of the owner to dispose of his interest was subject to many limitations, expressed either in statute or in the terms of the grant, some of which led to a great deal of litigation. All this is now simplified. Under the present law a Maori may dispose of his land, but any instrument of alienation is invalid until confirmed by a Maori Land Board. Until that point is reached it is no more enforceable than an unsigned or verbal agreement; less so indeed as part performance is ignored. The Maori may not dispose of his assumed interest in tribal lands save to the Crown, and it is the duty of the Board to see that in any case he retains sufficient for the support of himself and his family. To this, however, has been added a provision authorising an educated Maori to apply to be "Europeanised," and empowering the Governor-General to grant him this status. A Maori in this position can do what he likes with his land other than tribal interests, even to the last acre, which the Land Board while he was still a Maori would have compelled him to keep for the sustenance of himself and his family. Needless to say that friends of the Maori race are not without fear that even a highly educated Maori may be "worked" to *consent* to be made European as a mere conveyancing step.

A Maori declared to be European does not lose his tribal rights, and his children—of full or half-blood—are Maori as to their rights and disabilities. How this will work we do not yet know, as only a few Maoris have thus withdrawn their land from the protection of the statute. This may depend on how far the almost irresistible attraction of race-horse and motor-car owning is taken advantage of by speculators. There is a comic side to this new status. Under the laws relating to the sale of intoxicants the Governor-General has power to declare that in a district defined by him no liquor may be sold to a Maori. Cases are now occurring in which Maoris are obtaining the status of Europeans in order that they may be free to purchase intoxicants in such districts. Whether this trick is effective remains to be tested in the Supreme Court.

All matters connected with title to tribal land are dealt with by the Native Land Court, from the decision of which no appeal lies save to the Native Appellate Court, under a body of law generally spoken of

as Maori custom, which has never been published and of which the ordinary Courts have no cognisance. In general the decisions give satisfaction, but many mistakes have been made. Even in the case of ascertained freehold titles the successors have to be found and declared by the Native Land Court, and this is done quite irrespective of the law relating to the land of Europeans. Thus neither a wife nor a husband succeeds to any right in the lands of the other; children are the usual successors quite irrespective of legitimacy or illegitimacy, a rule which suits a people who, despite their adhesion to Christianity, make customary marriages without the prescribed ceremonies and revert lightly to polygamy when it suits them. The status of a native before his own Court is therefore very different from that to which he is limited before the Courts in which the general law prevails, so that Europeanising him may carry momentous consequences, some of the Maoris being great and wealthy landowners. I have touched on this question, not because it now presents itself as a question of general interest, but because the mere change from Maori to European by the order of a tribunal whose proceedings are never published, operating among a people often possessed of great wealth, may some day raise some interesting though unforeseen question.

A COMPARISON OF THE DRAFT PENAL CODE OF CHINA WITH THE INDIAN PENAL CODE.

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IT is attempted here to set out some of the more conspicuous differences between the draft Penal Code for China and the Indian Penal Code. For simplicity it is proposed to call them "the Chinese Code" and "the Indian Code" respectively. Should a Code be finally enacted for China, these two Codes will be those affecting the greatest number of human beings.

The "General Provisions" of the Chinese Code occupy a much greater proportion of the Code than do the corresponding parts of the Indian Code. At the same time two of the chapters of the Chinese Code, those on Suspension of Punishments and Conditional Release, would be treated in India in the Procedure Code or in the Prisons Act, while that on Prescription or Limitation would find no place in Indian Criminal Law. Other chapters would be unnecessary, or would be reduced to one or two sections under the Indian system.

Definitions.—Coming to the consideration of these General Provisions, we find that the chapter on the Application of Criminal Law make much the same claims as the Indian Code in regard to persons subject to the Code. That on Explanations seems defective as compared with the definitions of the Indian Code, such things as "dishonest," "wrongful,"

" unlawful " and the like not being defined, while there is a relegation of what the Indian Code calls " General Exceptions " to the chapter on Criminal Liability and Reduction and Remission of Punishments. As we shall see, they do not seem to be adequately treated even there. The actual definitions are but few, and include three due to peculiarities of Chinese jurisprudence, namely " lineal ascendant," collateral ascendant " and " relative." The definition of " grievous bodily harm " is not quite the same as that of " grievous hurt " in the Indian Code. This last includes emasculation, privation of the sight of either eye, privation of the hearing of either ear, privation of any member or joint, destruction or permanent impairing of the powers of any member or joint, disfiguration of the head or face, fracture or dislocation of a bone or tooth, and hurt which endangers life or causes the sufferer to be, during the space of twenty days, in severe bodily pain, or unable to follow his ordinary pursuits. To be grievous, most of these privations and injuries must be permanent. The Chinese definition is worded in very different phrases. It contains no reference to fractures or dislocations of bones or teeth, and it omits hurts endangering life. Further, it substitutes " permanent serious injury to body or health " for the Indian Code's twenty days' severe pain or incapacity. But, different though the wording be, the result arrived at in the two Codes is the same with the exceptions just noted.

Computation of Time.—The chapter on Computation of Time sensibly provides that a month shall mean thirty days. The absence of a provision of this sort in the Indian Code leads to some small unfairness or inequality. In India the day on which a man is released—and he generally is released quite early in the morning—counts as the last full day of his sentence. The Chinese Code makes him serve out his sentence till midnight on the last day of it, and directs that he is to be released before noon on the following day.

Intention.—The Indian Code makes Intention a part of certain offences, or requires an absence of Intention to ensure the application of certain general exceptions. The Indian Code also makes it an element of some offences that the act be done " voluntarily," " Intention " is not defined, but " voluntarily " is. The Chinese Code in the chapter on " Criminal Liability, etc.," enacts that " an act not done intentionally shall not be punishable, except where the negligence is specifically made punishable by law," and that—

> An act is done intentionally when the offender knowingly and wilfully causes the accomplishment of the constituent elements of an offence. An act is deemed to have been done intentionally when the offender could have foreseen that the act would accomplish the constituent elements of an offence, and the accomplishment was not contrary to his will.

This seems a very roundabout course to pursue. The Indian Code leaves intention to be made out as a matter of fact by evidence, direct or indirect, and in s. 39 defines " voluntarily " thus :

A person is said to cause an effect voluntarily when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew, or had reason to believe, to be likely to cause it.

This seems much more direct and simple. In India a child under seven years of age is in no case punishable, while in the case of a child between seven and twelve the Court has in each case to determine whether the child has arrived at such mental discretion and capacity as to make it responsible for its actual conduct in the particular case. The Chinese Code makes all children under twelve exempt from punishment, but provides that any such youthful offender, no matter how young, may be sent to a Reformatory, or be placed in charge of a guardian specially bound over. A provision finding no parallel in the Indian Code is that persons under sixteen or over eighty are to receive only a moiety of the prescribed punishment. In the Chinese Code we have a provision that " an act done in accordance with law or in pursuance of any lawful occupation shall not be punishable." The Indian Code further requires that, in the pursuance of a lawful occupation, there shall have been " proper care and caution." Ten sections of the Indian Code are devoted to a careful exposition of the Right of Private Defence, when it exists, and what its limitations are both in time and in forcefulness. The Chinese Code merely has, " an Act done in defence of one's own rights or the rights of another against imminent unlawful infringement thereof shall not be punishable," and " An Act done for the protection of the life, liberty, or property of one's self or of another against imminent danger which could not have been otherwise averted shall not be punishable." Each of these articles has a proviso much as follows : " Provided that where the Act was in excess of what was necessary for protection the punishment may be reduced or remitted." There seems to be here some intention to include both actual " Private Defence " and acting under what is called by commentators on the Indian Code " the Choice of Evils." This confusion is regrettable. So is it that the Chinese Code contains no definition of " unlawful." The Indian Code, when dealing with murder, specifically removes killing done when exceeding the limits laid down for private defence from the category of murder into that of culpable homicide not amounting to murder ; but, when there is not actual killing, leaves it to the Court to adjust the criminality in its sentence. It must be said that on this point of private defence the Chinese Code is far behind the Indian. Unless one supposes that the articles about intention are supposed to cover cases of mistake of fact the Chinese Code has no provisions on that point, nor do its exceptions cover judicial acts, acts done by consent, such as surgical operations, communications made in good faith, acts done under duress, or trivial acts. On the other hand, the Indian Penal Code has no parallel to the provisions for the lighter punishment of offenders who give themselves up voluntarily.

Attempts.—The Indian Code does not define an attempt, but makes punishable a person who attempts to commit an offence, or to cause an

offence to be committed, if the offence be punishable with transportation or imprisonment, if that person in such attempt does any act towards the commission of the offence. The Chinese Code defines an attempt as an act done in the commission of an offence, which remains unconsummated, whether because of impossibility of consummation or otherwise. This is probably the more comprehensive definition of the two. The Chinese Code, however, makes attempts punishable only when the body of the Code specifically enacts this. It makes an attempt punishable as severely as the offence itself, unless the means used were absolutely insufficient for success, in which case it follows the Indian rule for all attempts not specifically dealt with in the body of the Code, of one half the punishment. There are differences between the two Codes on the subject of Abetment, the Chinese Code regarding the instigator as more culpable than the mere assistant.

Punishments.—Under Punishments, transportation for life in the Indian Code becomes imprisonment for life in the Chinese Code, rigorous imprisonment becomes imprisonment, but it must last at least two months, and simple imprisonment becomes detention, but it must be for less than two months, and may involve labour, which simple imprisonment does not. The Chinese Code, in addition, has the accessory punishments of deprivation of civil rights and suspension of civil rights. Both Codes include forfeiture and fines among their punishments.

The Indian Code makes more severely punishable an offender who, after being convicted of an offence against property or the coinage, which is punishable with imprisonment for three years or upwards, is again convicted of any such offence committed after the first conviction. The Chinese Code makes any second or subsequent conviction for any offence a ground for higher punishment, provided that there has been less than five years between the termination of one punishment and the commission of the next offence, and grades the amount of extra culpability according as the offence is a second or later one, and according as it is, or is not, of the same class as the former one, or one of the former ones. The Chinese Code has many instructions as to what is to be taken into account in sentencing, most of the matters being such as a British or Indian judge would take into account as a matter of course, without need for a legal direction that he is to do so. Then the Chinese Code goes on to speak of extenuating circumstances. As the Court has just been directed to take account of nearly all circumstances which may be extenuating, this probably is inserted in order to do away with any possible liability to enhanced punishment. Increases and decreases of punishment, apart from the extra liability of old offenders, are things unknown to the Indian Code, but eleven articles of the Chinese Code are taken up by them.

In the matter of suspension of punishment the Chinese Code gives much wider discretion to the Courts than does section 562 of the Indian Criminal Procedure Code. Under the Chinese Code any person who has not previously been sentenced to imprisonment for five years or up-

wards may get his sentence suspended, provided that if there be a previous sentence against him, he have a clear record for the last three years or the last five years, that is, a clear record of that time between release from imprisonment and committing an offence. But, in order that a sentence be suspended, it must not exceed imprisonment for two years. The Indian Criminal Procedure Code differs widely, for it directs that the Court may release first offenders on security, and that, when this is done, no sentence is to be passed before they are released. Under the Chinese Code the suspension is to be for not less than three nor more than five years. It is revoked if during that term the person concerned is sentenced to detention, or to a more severe punishment, or should it be discovered that he was not entitled to be treated as a person with a clear record. If the suspension be not revoked during the term, the sentence becomes null and void. In India the term of the bond and security is not to exceed a year; it is to bind the person concerned to be of good behaviour, and to keep the peace; if he fail to observe its conditions,he can be brought up and sentenced; and the provisions are applicable only to actual first offenders, and only where certain particular offences are concerned.

Offences.—The second part of the Chinese Code,which deals with actual offences, is in many respects not so full as the Indian Code. Trespass and public nuisances are not so completely treated, and there is an absence of distinctions between the various categories of mischief. Nuisance in general is neither defined nor punished in the Chinese Code; but the more dangerous nuisances are made severely punishable, and among them are offences which modern conditions have brought into prominence, while they cannot have been much before the minds of the framers of the Indian Code.

Offences against the Public.—In respect of Official Corruption the Indian Code makes the receipt or solicitation of a bribe the substantive offence and the offer or presentation of one an abetment. The Chinese Code places both on the same footing. A heading under which the Chinese Code is defective as compared with the Indian Code is that of offences against the lawful authority of public servants. Such matters as the wilful tender of false information to mislead a public servant are omitted. On the other hand, the Chinese Code includes election offences. These are now being provided for in India by a special law. Under the Indian Code five is the requisite number before an assembly as such can become unlawful; in the Chinese Code we find three. The Chinese Code widens the category of unlawful objects for an assembly in that it includes any intention to employ threats or commit violence; but it does not include mere intention to commit a trespass, and in this and some other points the Indian definition is the wider. The Chinese Code also makes punishable threats to commit violence against life, person or property if they disturb the public peace, herein being more comprehensive than the Indian. The Chinese Code contains provisions as to the duty of the public to report the imminence of certain offences, the intention to commit

which is known, this being a matter left in India to the Code of Criminal Procedure. The Chinese Code leaves out serious thefts, riots, mischief by fire and house-breakings from the list in the Indian Procedure Code, but adds rape, currency offences and piracy. It should be added that in India what the public have to report in general is the commission of an offence, as well as the intention to commit it. In the matter of the destruction of evidence the Chinese Code exempts this from punishment when done for one's own purposes to escape punishment for an offence, or to save a relative from punishment. This appears to be a most questionable provision. On the other hand, making it no offence to give false evidence to save a relative may in effect be a method of inducing the Courts always to reject the evidence of relatives of the accused, and so to save them from the risk of believing a certain amount of perjured evidence. The Chinese Code has provisions punishing strikes of employees in works of public utility, gas, water, electricity and the like. Such things were hardly thought of when the Indian Code was framed. The Chinese Code defines the simplest case of forgery as counterfeiting a seal or the impression of a seal, or any signature, in such manner as is likely to cause injury to the public or to any person. This is far simpler than the Indian Code's lengthy definition of a false document, together with the definition of forgery as certain cases of making a false document. Rape is defined in the Chinese Code in very different words from those of the definition in the Indian Code, but the two definitions reach substantially the same result. The Indian Code makes special provision under bigamy for those, for instance, Hindu and Mohammedan males, who are allowed a plurality of spouses by the law of their religion. The Chinese Code enforces monogamy for all.

Culpable Homicide.—The Indian Code first defines culpable homicide. It then states a definition of murder, which includes most cases of what has already been defined as culpable homicide. It then states as exceptions to the definition of murder that in certain cases " culpable homicide is not murder," these cases being where there is grave and sudden provocation (if the provocation be neither sought nor provoked, nor given by a public servant acting lawfully, nor by a person acting in the exercise of the right of private defence), where the right of private defence is exceeded in good faith, where the death is due to excess of zeal in good faith on the part of a public servant, where it occurs in a sudden and fair fight without premeditation, and where the deceased, being at least eighteen years of age, takes the risk of death with his own consent. In such cases the offence will be culpable homicide not amounting to murder. In the Chinese Code we find homicide defined simply as causing the death of another. That by itself may be punishable with death, but there is a minimum sentence of imprisonment for ten years. Certain aggravations in the method of killing raise the minimum to imprisonment for life, as do certain aggravations of circumstances. Death is the minimum where the deceased is a collateral ascendant. By a roundabout way the

Chinese Code reaches much the same result as the Indian Code. For "grave and sudden provocation" the Chinese Code substitutes "justifiable provocation." This apparently is a mistranslation, "justificatory" being intended.

The Chinese Code punishes causing bodily harm by means likely to cause death or grievous hurt, which would include the very common cases in India of fights with heavy sticks or clubs, with imprisonment for from six months as a minimum to five years. The Indian Code punishes causing hurt with a maximum sentence of imprisonment for one year with a possible fine, there being no minimum, and fine alone being a possible sentence. The Chinese Code, in its article against influencing the action of others by threats or violence, goes a good deal further than the combined effect of the provisions of the Indian Code as to criminal force and criminal intimidation. The Chinese Code deals with defamation more simply than does the Indian Code, privilege being settled by the provision that nothing not intended to be communicated to at least three persons is defamatory, and by enacting that a true statement is not to be punished, but that the truth of a statement about a man's private life may not be proved unless publication of the truth is for the public benefit. It must be admitted that the provisions of the Indian Code are more careful and detailed, but it is hard to say which set is more suited to an Asiatic country.

Theft.—The Definitions of Theft in the two Codes do not differ in actual effect to any great extent, but the Chinese Code deals separately with "snatching," which under the Indian Code is simply a particular case of theft. The Indian Code has no provision exempting from punishment thefts against a wife or other relative in the same household, while the Chinese Code has such a provision, which rather points to the enforcement of family communism.

In India it is an offence dishonestly to receive or retain stolen property, which the offender knows or has reason to believe to be stolen. The Chinese Code makes punishable "whoever receives anything obtained through the commission of an offence." It also punishes the transportation, acceptance in deposit, or purchase, or the acting as a medium or agent for the sale of any such thing. One has to remember that under its general provisions an act not done intentionally is not punishable, and that "knowingly and wilfully" is to be taken as the same thing as "intentionally," and that an act is to be deemed to be intentional "when the offender could have foreseen that the act would accomplish the constituent elements of the offence." The Indian Code is strictly practical in regarding in this case rather the ability to look back and surmise the origin of the property which has been stolen. The application of the Chinese principle of foresight, which is not excluded by the Chinese Code in this instance, would seem to be of practical application in the case of stolen property, only in such cases as that of the King's messenger in *Through the Looking-glass*, where "of course the crime comes last of all."

PROPORTIONAL REPRESENTATION IN MODERN LEGISLATION.

[*Contributed by* J. Fischer Williams, Esq., C.B.E.]

What follows is not an attempt to state the arguments for or against proportional representation, nor to discuss the causes and the possible developments of the dissatisfaction with existing representative institutions which are well known to all political observers. The aim of the present paper is less ambitious; it is merely to give a summary of what at the moment of writing is believed to be the actual state of the legislation by which all over the world various forms of what is known as proportional representation have been enacted. I say "is believed to be," because unluckily the machinery of political intercourse is still so little developed that no central bureau exists where all contemporary legislation is at once recorded and indexed, and the materials from which this article is derived have been accumulated by the private labour of a voluntary society assisted by the unofficial correspondence of political students in different parts of the world. It is therefore probable, or rather certain, that there are omissions in this article, and possibly in some cases quite recent legislation will have made some difference in the facts recorded.

Definition of Proportional Representation.—With this brief apology let us begin our survey. And first let us define our subject. "Proportional representation" is the name given to all those electoral methods which aim at reproducing in the elected body the opinions of the electorate in their true proportions.[1] All such electoral methods have this in common, that they reject the attempt to represent by one individual the electors resident in one geographical area—the single-member constituency as at present established in the United Kingdom—and require constituencies returning several members. The members thus elected represent the sections of the electors whose votes have caused their election. The number of members elected for a constituency may be as small as three,[2] or as large as local conditions of convenience will admit; the larger the number of members per constituency the more accurate will be the representation. Thomas Hare, the inventor of the single transferable vote, indeed proposed to treat the whole United Kingdom as one constituency—politically an impossible proposal. For the choice of the persons to be elected in the "multi-member" constituency (if an awkward but accurate expression may be allowed to

[1] The political advantages which supporters of proportional representation claim as following from the adoption of the new electoral methods are no doubt included in the aims of those supporters, but they are the results of the new methods and not a part of them.

[2] *I.e.* for constituencies for which a proportional representation is desired. This is not to say that in a proportional system adopted for a country as a whole certain districts—usually of widely scattered populations—may not remain as single-member constituencies.

pass), two principal types of method are in force.[1] On the one hand, the single transferable vote has been widely adopted in the British Empire and is now invading the United States, and, on the other hand, we have various systems of election by means of lists of candidates—"list systems"—which have been spread through Continental Europe. The variations in electoral systems based on the single transferable vote are small and unimportant; list systems, on the other hand, may differ widely *inter se.*

The leading characteristics of the system of the single transferable vote are suggested by its title; each elector has one vote and one vote only, which may, however, be "transferred" in accordance with the wishes of the elector as indicated on his ballot paper from candidates to whom the vote is useless to other candidates whom the elector may wish to favour. The leading characteristic of list systems is that the elector votes not—or not merely—for one candidate, but for a group or "list" of candidates standing together.[2] On the system of the single transferable vote the electors form themselves into separate "masses," or "quotas," in support of individual candidates; in list systems they give their support to a number of candidates already grouped. On the system of the single transferable vote, candidates are elected separately and individually. In list systems the general rule is that the "list" receives a number of seats proportionate to the number of votes cast for it, and the question which individual candidates of the list are to be elected is determined by methods which vary according to the system adopted.

Form of Legislation.—The system of the single transferable vote requires a set of instructions to returning officers prescribing the processes of counting and transferring the votes. These instructions will be of a technical and detailed character, not suitable for parliamentary discussion, and better embodied in "Rules" than in the text of an Act of Parliament. This is the method which has usually been followed in all legislation in the British Empire introducing proportional representation. Thus the Local Government (Ireland) Act, 1919, enacted:

S. 1. (1) At a contested election of members of a local authority for any local electoral area constituted under this Act, any election of the full number of members for the area shall be according to the principle of proportional representation, each elector having one transferable vote as defined in this Act.

S. 10. (1) The Local Government Board may make such orders as appear to them to be necessary or proper for giving full effect to this Act, including Orders—

(*a*) Prescribing the method of voting and transferring and counting votes at any election conducted according to the principle of proportional

[1] The earlier experimental methods of the so-called "limited" and "cumulative" vote have now been everywhere (or almost everywhere) discarded and have only an historical interest.

[2] A "list" may, however, consist of one name only.

representation in pursuance of this Act, and the duties of returning officers in connection therewith.

The necessary regulations were embodied in the Local Elections (P.R.I.) Order, 1919, No. 220 M./1919.[1]

The details of the system of the single transferable vote when embodied in rules providing for all contingencies may appear at first sight to be complicated, but in practice wherever the system has been introduced—in Tasmania, in New Zealand, in South Africa, in Scotland, in Ireland, in Canada—no mechanical difficulty has arisen. The system indubitably works.

The reservation of the details of the process for statutory rules has the great practical advantage that such rules are easy of amendment whenever experience suggests an improvement of their mechanism. Such improvements are matter for the expert: they involve no point of principle and fall well within the departmental as distinct from the parliamentary sphere.

Australasia.—In any account of the extent to which at the present day the proportional principle has been adopted in the British Empire and elsewhere, the first place amongst English-speaking peoples must be claimed for Australasia. Already in 1840 (nineteen years before the first definitive publication of Hare's famous book *On Representation*) the city of Adelaide (South Australia) was given a system of proportional voting for the election of the municipal corporation based on the principle of the quota—then called "quorum"—though the single transferable vote had not been discovered. This experiment was, however, short-lived. The legislation of 1840 was amended in 1842 and repealed in 1846, when the corporation (then apparently heavily in debt) was for a time dissolved. In 1862, three years after Hare's book, an attempt was made to introduce the Hare system in New South Wales: a bill to this effect passed the Legislative Council and was read a second time in the Assembly. But shortly afterwards the Government resigned and the Bill was lost.

Tasmania.—Thirty-four years later the modern and more successful struggle for P.R.[2] began; this time the move was made in Tasmania. In 1896 the Tasmanian Electoral Act applied P.R. by the method of the single transerable vote to parliamentary elections in constituencies returning more than one member—that is, to the towns of Hobart and Launceston. This was the first time that the system was used for parliamentary purposes. The method proposed included an advance on the system advocated in the United Kingdom in 1884–5, in one technical detail of some importance—the method of choice of the votes in excess

[1] Statutory Rules and Orders, 1919, No. 1989. Local Government, Ireland. The Local Elections (P.R.I.) Order 1919, No. 22OM./1919. See particularly Rules 38, 52 to 64, 67, and Fourth, Fifth and Seventh Schedules.

[2] This contraction for the polysyllabic "proportional representation" is in universal use in English-speaking countries, and the reversed form "R.P." (*représentation proportionnelle*) is equally common among the Latin races.

of the quota to be transferred from an elected candidate who has more than the quota. The votes to be transferred to each candidate were to be ascertained in such a manner as to make it physically certain that each candidate would receive votes in exact proportion to the number of next preferences for him contained in the whole of the votes of the elected candidate, whereas the system advocated in the United Kingdom in 1884–5 left this point to the operation of the theory of chances, the votes to be transferred being selected at haphazard—mathematically a quite satisfactory solution; but electors have no belief in mathematics. The Act was in force for the Tasmanian general elections of 1897 and 1900, but was repealed in 1901, partly owing to the dissatisfaction caused by the fact that P.R. applied only to the two large towns, while in the country districts the old majority system with single-member constituencies prevailed. The party which was strong in the towns had to concede a share of representation to its opponents who, in their turn, made no similar concession in the country. In 1907 Tasmania returned to P.R. and adopted it for the whole island. The Electoral Act of that year divided the country into five constituencies returning each six members; the rules for the transfer of votes included a further mathematical refinement ensuring absolute accuracy of calculation, not only in respect of "next preferences" but of *all* subsequent preferences, a refinement which, for the most part, other communities have not thought it necessary to adopt when they have introduced P.R. The Act of 1907 has governed five general elections, 1909, 1912, 1913, 1916 and 1919, and is still in force. It has, however, been amended in one respect—namely, the method to be followed at a bye-election—by an Act of 1917.

Bye-elections naturally cause some little difficulty on a proportional system. If the constituency is polled as if it were a single-member constituency, then if the vacating member was one of the representatives of a minority, his party will lose the seat even though they are gaining ground in popular favour. The Tasmanian Act of 1917 has solved the difficulty by directing the returning officer to re-examine the ballot papers by which the vacating member was elected and declare elected the unelected candidate who is the next preference of the voters whose representative is gone. This is simple enough, but it is not the fresh consultation of the electorate which is what English politicians mean by a "bye-election." There are other methods proposed for filling casual vacancies besides the Tasmanian plan and the simple method of polling the whole constituency, but, except in the case of Winnipeg, referred to later, none of them has yet received legislative sanction.

New South Wales.—The Tasmanian example led to several attempts to introduce P.R. in the other Australian States; none of these attempts succeeded until 1918, when New South Wales passed an Electoral Act (No. 40, of 1918) which applied P.R. to the election of the Legislative Assembly; the Act included a very unusual provision requiring a voter

to mark preferences up to the full number of seats to be filled—a provision which is a manifest violation of the right of the voter to govern his vote as he pleases ; it was applied at the general election of March 1920. Thus the two cases in which P.R. has been applied in Australia are cases of the election of the popular Houses of Parliament. This is in contradiction with the theory adopted by the Royal Commission on Electoral Systems in 1908—that P.R. and the single transferable vote are peculiarly suitable for the election of second chambers and of municipal bodies.

Queensland and Victoria.—The extension of P.R. in Australia has been influenced—whether favourably or not it is difficult to say—by the use both for some Commonwealth elections and for elections in Queensland and Victoria of the transferable vote (not necessarily the *single* transferable vote). The Australians often call this vote " the contingent vote " ; in the United Kingdom the expression " the alternative vote " is generally used. The mechanism of this vote is in the essential feature of transferability the same as that of the single transferable vote, and its use therefore familiarises the electorate with one essential of the latter system, but politically the contingent or alternative vote is a device not for the proportional representation of all considerable sections of the electorate, but for the exclusive representation of the majority.

New Zealand.—The Australian example has produced its effect in New Zealand, but in that Dominion—unlike Australia—the P.R. principle has so far been limited to the second chamber and to municipal elections ; in fact, development has followed the lines suggested by the Royal Commission on Electoral Systems. Bills for the general application of P.R. to parliamentary elections were introduced in 1878, 1883, 1888, 1889, 1896, 1898, 1899 and 1904, but were lost, and the first legislation establishing P.R. was not passed until 1914. In that year the Legislative Council Act provided for the election of the Legislative Council by P.R. and the single transferable vote ; the operation of the Act was suspended during the war, and the first election will be held in 1922. In the same year (1914) the New Zealand Legislature passed the Local Elections (Proportional Representation) Act, which permitted municipalities by a majority vote in the Council to adopt P.R. for their own elections. By an Amending Act of 1915 power to adopt P.R. was extended to any local authority of seven or more members. Under these enactments P.R. was adopted and used in 1917 by the city of Christchurch and the borough of Woolston. Christchurch Council repealed the adoption of P.R. in 1918, but in 1920 this Council again adopted the new system.

South Africa.—In South Africa the introduction of P.R. dates from 1909, and up to the present time developments have been confined in substance to second chambers and to municipalities. The South Africa Act, 1909, was the first Act of the Parliament of the United Kingdom definitely to establish P.R. and the single transferable vote : it applied

the system to the Senate of South Africa, and also to the election of the Executive Committees of the Provincial Councils. P.R. was further unanimously approved for the Lower House of the Union Parliament by the South African National Convention of 1909 on the recommendations of which the South Africa Act was based. This part of the proposal was, however, dropped owing to the opposition of the Parliament of Cape Colony.

S. 134 of the South Africa Act, passed by the Imperial Parliament in 1909, provided:

> The election of senators and of members of the executive committees of the provincial councils as provided in this Act shall, whenever such election is contested, be according to the principle of proportional representation, each voter having one transferable vote. The Governor-General in Council, or, in the case of the first election of the Senate, the Governor-in-Council of each of the Colonies, shall frame regulations prescribing the method of voting and of transferring and counting votes and the duties of returning officers in connection therewith, and such regulations or any amendments thereof, after being duly promulgated, shall have full force and effect unless and until Parliament shall otherwise provide.

In the same year the Transvaal Municipal Elections (Proportional Representation) Act (passed by the Legislature of the pre-Union Parliament of the Colony) applied P.R. to the municipal elections of Pretoria and Johannesburg; the system was extended in 1914 to all municipalities in the Transvaal, was adopted by one of the smaller towns, and remained in force until 1918, when the Transvaal Provincial Council (where a powerful section of opinion has always been hostile to proportional representation) abolished the new system. The municipal question is now again under the consideration of a Commission. The general tendency of opinion in South Africa is, however, apparently not unfavourable to P.R. In the same year as that which saw the repeal of municipal P.R. in the Transvaal a select committee on the future constitution of the Senate reported (Senate S.C. 4–1918) in favour of a senate to be constituted (with the exception of four members nominated by the Governor-General as experts in native affairs) by popular election by P.R. on the system of the single transferable vote, each of the four Provinces (like the States of the American Union in the Senate of the United States) having an equal number of members.

Canada.—The proportional movement in Canada is of more recent origin, but the transferable vote before its introduction in legislation had been adopted by the Toronto District Labour Council (1898) for the elections of officers and delegates, and this example had been followed by a few other voluntary organisations during later years. Recently the movement has shown a remarkably rapid growth. In 1916 a plebiscitary vote of the citizens of Ottawa asked for P.R. for municipal elections, but the Ontario Legislature refused to take action. But in the same year the Legislature of Alberta took a different line and passed

Acts permitting the citizens of Calgary and Edmonton to amend their municipal charters so as to allow elections to be held by P.R. Calgary took advantage of the Act ; the first municipal P.R. elections were held there in December 1917, and the process has been repeated in December 1918 and 1919.

In the following year (1917) the Legislature of British Columbia passed an Act (Municipal Proportional Representation Act, 1917) allowing municipalities after plebiscite to use P.R. In 1918 the Act was applied in the townships of New Westminster, Nelson, Mission and West Vancouver. In the present year (1920) the Act has been adopted by large popular majorities in Victoria and Vancouver : the first elections will take place in January 1921. The rules used are in effect identical with those which, as mentioned below, are used in the United Kingdom.

In 1919 Saskatchewan followed the example of Alberta and British Columbia, and passed an Act permitting the adoption of P.R. by popular vote for municipal elections.

Lastly, in 1920 P.R. advanced from municipal to parliamentary elections ; the Manitoba Electoral Act applied the system to parliamentary elections in the city of Winnipeg, returning ten members in a single constituency. The first election was held with complete success in June 1920. The rules were, save for verbal alterations, identical with the British rules. A point to note is that there is to be no bye-election until two vacancies have occurred in the constituency.

United Kingdom.—These developments in the Dominions have reacted on, and in turn been influenced by, the progress of P.R. in the United Kingdom. The South Africa Act, 1909, has already been mentioned, but its sphere of operation was not in the United Kingdom, and the P.R. section attracted little attention there. The Home Rule Bill of 1912—afterwards the Government of Ireland Act, 1914—was of more direct influence. It introduced P.R. for the election of the Irish Senate and for thirty-one members (all the members for multi-member constituencies) of the Irish House of Commons. The amending Bill, which was at its final stages in the House of Lords when war broke out, made the whole Irish House of Commons elected by P.R. The present Home Rule Bill (October 1920) proposes P.R. for all parliamentary elections in Ireland (both Houses).

For reasons which this is not the place to discuss, P.R. has been recognised as having a special value for Ireland, and the P.R. sentiment is strong there, having been powerfully nourished by the provisions of the Local Government (Ireland) Act, 1919. That Act has established P.R. for *all* local elections throughout Ireland : the machinery operated with perfect success in January 1920 (urban authority elections) and June of the same year (rural authority elections). The Act was introduced and passed as a result of the striking success of P.R. at the municipal elections of Sligo in 1919 : the Sligo municipality was bankrupt and a private Act was necessary (1918) to reconstruct the local affairs.

This private Act—largely owing to the exertions of Mr. Scanlan, then M.P. for Sligo—included a provision for the election of the members of the municipality by proportional representation.

If P.R. is thus familiar throughout Ireland it is equally true that every Scottish local elector has had the opportunity of voting at a P.R. election. The Education (Scotland) Act, 1918, introduced important reforms in the Scottish educational system, and incidentally substituted P.R. for the system of the cumulative vote, formerly in use in Scotland (as at one time in England) for School Board elections. The first elections were held all over Scotland in the spring of 1919. There was no hitch.

The rules under which the Irish local elections were held are printed (as already mentioned) in the Local Elections (P.R.I.) Order, 1919, No. 22OM./1919, issued by the Local Government Board for Ireland; the Scottish Rules are to be found in the Education (Scotland) Acts, 1872 to 1918—General Order regulating the First Elections of Education Authorities under the Education (Scotland) Act, 1918—Form 77T/Scotland/February, 1919 (issued by the Scottish Office). These two sets of rules differ only in very small points of detail, and both of them represent an elaborated form of the Hare-Clark rules which were first used in Tasmania under the Tasmanian Electoral Act of 1896; they do not follow the very accurate provisions as to the mathematical details of vote-transfer which appear in the Tasmanian Rules of 1907, as experience is thought to establish (the Royal Commission on Electoral Systems approved this view and the Tasmanian authorities have expressed their agreement) that there is no practical necessity for the extra labour involved in the later Tasmanian Rules. The Canadian Rules, as has already been mentioned, generally follow the British procedure and do not require the full Tasmanian refinements.

A further parliamentary application of P.R. in the United Kingdom appears in the Representation of the People Act, 1918, which introduced the single transferable vote for university constituencies returning two or more members: (Oxford 2, Cambridge 2; other English Universities (grouped) 2; Scottish Universities (grouped) 3; Trinity College, Dublin, 2). This was a *tabula ex naufragio*. The Reform Bill as introduced in 1917 included, in accordance with the recommendation of the Speaker's Conference on Electoral Reform, P.R. for all the larger urban constituencies; the House of Commons rejected this reform of its own constitution and, though P.R. was restored by the House of Lords and proposed to be applied universally throughout the United Kingdom, the difference of opinion between the Houses was first compromised temporarily and then resolved by the omission of P.R. for all except the university constituencies. In the general election of 1918 the university constituencies voted by the single transferable vote, but the small number of members to be returned by each constituency prevented the public from realising the full meaning of the new system.

There has been one other instance of the introduction of the system in the United Kingdom under parliamentary powers. The single transferable vote is used under regulations drafted under the auspices of the Archbishops of Canterbury and York by virtue of the Church of England National Assembly (Powers) Act, 1919, for the election of the House of Laity, which represents the lay members of the Church of England in the National Assembly. The first election of this body took place in 1920. Its term is five years.

Lastly, before leaving the United Kingdom, let us remark a legislative attempt not yet successful; in the last parliamentary session (1919), and again this session (1920), a Bill (first introduced twelve years ago) allowing municipal bodies to adopt P.R. passed the House of Lords; but though government support in the House of Commons was promised the measure has not yet become law. In 1910 the House of Commons had passed without a division a resolution approving the permissive application of P.R. to municipalities. The Dominions—as has been seen—have acted on this resolution.

India.—In India the door for P.R., though not exactly open, may be said to be ajar. For the new legislative bodies to be established in India under the Government of India Act, 1919, the single transferable vote is to be employed (*a*) in the Bengal (European) constituency for the Legislative Assembly of India; (*b*) in the Madras (non-Muhammadan) constituency for the Council of State for India; (*c*) in the Bengal (European) constituency for the Bengal Provincial Legislative Council; and (*d*) for the election of two-thirds of the Committee on Public Accounts in the national and in all provincial legislatures.[1]

Crown Colonies.—As to the Crown Colonies, advantage has been taken of the opportunity offered by the recent constitutional changes in Malta to introduce a measure of P.R.; according to the draft constitution for the island published in the *Malta Government Gazette* of June 16, 1920, both the Senate and Legislative Assembly, which are to replace the existing Council of Government, are to be elected by P.R. The question of the system to be adopted is still under discussion in Malta. In British Honduras, Bélize has used the transferable vote for the election of the municipal council since the year 1911.

United States.—In the United States the movement is at present in its infancy, and the main effort of the advocates of P.R is directed to securing its adoption for the election of city councils, though the system is also being advocated for state elections in Pennsylvania and New Jersey. So far three cities have adopted the reform: Ashtabula (Ohio), Kalamazoo[2] (Michigan), and Boulder (Colorado). In every

[1] See Draft Electoral Rules for the Indian Legislature (Cmd. 813.–1920). Draft Rules for elections to Provincial Legislative Councils (Cmd. 812.–1920). Draft Rules of Business for Provincial Legislative Councils and the Indian Legislature (Cmd. 814.–1920).

[2] The Supreme Court of Michigan has recently held that under the State Constitution P.R. is unconstitutional.

case the system chosen has been that of the single transferable vote. The British Empire and the United States, as already observed, are territories of the single transferable vote; no "list" system has yet established itself there. In the rest of the world (with the partial exception of Denmark) list systems reign supreme. May we see in this an indication of the greater individualism of Anglo-Saxon civilisation and of the Continental—or Latin—tendency to regulation and control?

List Systems.—Within the limits of this paper it is impossible to give an account of "list systems." List systems are almost infinitely various in their details. But, as already intimated, all list systems have this in common, that political parties (which are thus officially recognised by the State) put forward "lists" of candidates to the electors and that the electors, whether in form they vote for the list as such or for individual candidates figuring on the list, must in effect give support to the "list" as a whole. The seats in the constituency are distributed among the lists in proportion (the rules for fixing the proportion are various) to the amount of support which the list—or its candidates—has received, and the determination of the vital question, which of the candidates on the list are to receive the seats allotted to the list, is also the subject of various regulations. For the detailed study of these matters readers are referred to the publications of the Proportional Representation Society (82, Victoria Street, Westminster, S.W.1).

European Countries.—The P.R. movement on the Continent received a great stimulus from Hare's book, supported by the later advocacy of J. Stuart Mill, and during the period 1860 to 1890 the theory and practice of P.R. was a favourite theme for political scientists. Societies and periodicals advocating P.R. sprang into existence in various countries. It was not, however, until 1891—the introduction of P.R. in Denmark in 1855 was an isolated phenomenon due solely to the initiative of the distinguished mathematician and economist Andrae—that these discussions began to produce widespread practical effects in Western Europe.[1] In that year popular agitation in Switzerland resulted in the introduction of P.R. for the cantonal elections of Ticino. Thence the system spread to other cantons and finally was adopted for Federal purposes on referendum by popular majority (297,000 to 147,000) in 1919, two previous attempts in the same direction in 1900 and 1910 having failed.

In Belgium P.R., which was first introduced for communal elections in 1895, and parliamentary elections in 1899, is now established for all elections, parliamentary, provincial and municipal. The same statement is true of Bulgaria (since 1914), of Denmark (since 1909 for municipal elections and since 1915 for both Houses of Parliament), of Holland (since 1918), and of Sweden (since 1909). Finland, on regaining self-government in 1906, adopted a proportional system for the election of

[1] In 1888 P.R. had been adopted in the Serbian constitution for the election of the Skupchtina. The electoral laws of 1890 and 1903 duly gave effect to this constitutional provision.

its Diet. Norway in 1896 made P.R. optional in local elections, and advantage has been very widely taken of these powers; in 1919 a Norwegian parliamentary commission on constitutional reform reported unanimously in favour of P.R. for the National Legislature.

Indeed after the war there was a general feeling throughout Europe that if parliamentary institutions were to be saved and to be given the necessary condition of effective working, P.R. was a necessity. In this general European constitutional reorganisation Germany adopted P.R. for the National Constituent Assembly (1918) and for the Reichstag and for all State (Land) Parliaments under the new constitution (1919), which requires P.R. also for municipal elections. Similarly, in Austria P.R. was adopted for the National Constituent Assembly (1919) and will be continued for the parliaments of the future. Luxemburg in 1919 adopted P.R. for the National Assembly.

The Russian Constituent Convention of 1917 was elected by P.R. and the system has been continued for certain important committees by the Soviet Republic. The Parliament of Russian Armenia was elected by P.R. in 1919.

In the Republics of Poland and of Czecho-Slovakia the National Assembly is elected on a proportional system. The same is true of the Legislative Council of Danzig. In France, on the other hand, the proportional movement, when apparently on the eve of success, was checked by the adopton of a system which is primarily merely a substitute for the second ballot and gives only a partial and uncertain protection to minorities when no list has an absolute majority. But this set-back was compensated by the action of Italy. In 1919 Italy adopted a thorough-going system of P.R. for the Chamber of Deputies—a system of great interest to the political student and one for which its supporters may claim that it represents the results of the gathered political experience of the last twenty years.

Central and South America.—Central and South America have not escaped the pervading impulse. In Brazil experiments in minority representation by means of the limited vote were made as long ago as 1855. In Uruguay P.R. proposals in 1872 and 1878 were set aside by the dictatorship; attempts at reform were renewed in more recent years, and at last in 1919 a system of P.R. was applied in parliamentary elections under the new constitution. In the Argentine Republic P.R. has been established in the State of Buenos Aires for the election of deputies and senators since 1876, and in the State of Mendoza since 1895. Cuba adopted a list system for the National Assembly in 1908, and in 1917 the United States gave Porto Rico a new constitution in which a small portion of both Houses of the Legislature were elected under a P.R. system.

Here space fails me, but perhaps enough has been said to show that this proportional movement deserves the careful attention of all students of the tendencies of contemporary constitutional legislation.

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DOUBLE TAXATION IN HOLLAND, NORWAY, SWITZERLAND AND ITALY.

[*Contributed by* S. E. Minnis, Esq.]

The issues of the *Bulletin de l'Institut Intermédiaire International* for January–April, 1919, October 1919, January 1920, and October 1920, contain a series of articles dealing with the subject of double taxation in connection with the revenue laws of the Netherlands, Norway, Switzerland and Italy.

Holland.—The first article, by M. J. B. J. Peeters, deals with the Dutch Income-tax Law of 1914, the Dividend Tax Law of 1917, and the War Profits Tax Law. In general, the Income-tax Law (which applies to individuals only) imposes liability on residents in Holland in respect of their full net income from every source, while persons who are not resident in Holland are liable in respect of their Dutch income. The scope of the tax is, however, modified by a number of special provisions intended to prevent double taxation of the same income by both the Netherlands and its colonial possessions. Thus, persons who are domiciled in one of the Dutch colonies are exempted from Dutch tax in respect of salaries and pensions payable by the Treasury of the Mother-country, and also in respect of income accruing from real property in Holland otherwise than as the result of the carrying on of a business there. Reciprocal treatment, it appears, is granted by the colonies to persons domiciled in Holland who derive a salary or pension from a colonial Exchequer, or income from colonial real property.

A further provision deals generally with the case of persons domiciled in Holland who derive any income which is subject to taxation in the Dutch colonies, granting an abatement from the Dutch tax. The method of calculating this abatement is interesting. First, the duty applicable under the graduated scale of charge to the total taxable income, Dutch and Colonial, is ascertained. Then from this is deducted the tax which would be applicable under the Dutch scale to a total income of an amount equal to the colonial income. An example is given by M. Peeters, illustrating the effect of this method of allowance as compared with what would result if the income taxed in the colony were simply left out of account. Thus: Total income, 6,000 florins, of which 2,000 florins are derived from the Dutch East Indies.

Tax on 6,000 florins	145 florins.
Deduct tax on an income of 2,000 florins	25 florins.
Balance payable	120 florins.

But tax on an income of 4,000 florins would be 85 florins only.

The Legislature has not found it possible to deal by specific statutory provision with the problem of double taxation of the same income by the Netherlands and by a foreign country, but a section has been inserted in the law reserving to the Crown the power of entering into conventions with foreign States, on a basis of reciprocity, for the purpose of

preventing, so far as practicable, a double charge on the same individual. It appears, however, that no convention has yet been entered into in pursuance of this section.[1]

Dutch companies are not now taxed under the Income-tax Act, but are charged at a flat rate under the Dividend Tax Law of 1917, on the basis of profits distributed. In the case of this tax, relief from double taxation is provided for in relation both to the Dutch colonies and to foreign countries. If a company established in Holland is also liable in a colony to a tax on its profits accruing in that colony, the proportion of the sum distributed which corresponds to the ratio between the colonial profits and the total profits is abated by two-thirds. A company in receipt of profits which are taxed in a foreign country is treated on similar lines, except that the abatement is one-half instead of two-thirds.

The Dutch War Profits Taxation Acts provide for the taxation of the war profits of persons established in Holland wherever such profits arise, and also of war profits accruing in Holland to persons established in the Dutch colonies and foreign countries. To avoid double taxation in the case of a colony imposing a tax with a similar wide scope, it is provided that the colonial tax shall not be levied where the Dutch tax is shown to have been levied, but that the Dutch Exchequer shall pay over to the Colonial Exchequer a sum equal to one-half of the duty lost by the colony.

Norway.—The second article by Dr. Arne Rygh, of Christiania, describes the Norwegian system of direct taxation. The income and property taxes apply to persons residing in Norway in respect of—speaking broadly—their whole income and property, while persons residing abroad are liable in respect of business carried on or real property situated in Norway. To this general principle there is the exception that Norwegian residents are not chargeable to the property tax on real property situated abroad, and are chargeable to income-tax on one half only of the income from such property. It will be noted that the liability of non-residents is confined to their business and real property in Norway. Thus a non-resident holding a mortgage on property in Norway is not liable, but he would become liable on taking possession of the mortgaged property.

There is in the law a provision of some interest but of little importance in practice, empowering the Sovereign to enter into agreements with foreign States with a view to apportioning the duty on a business which is liable to taxation both in Norway and in a foreign State. The

[1] Owing to the delay—arising no doubt in part from war conditions—in giving effect to the provision mentioned in the text, a short Act was passed in March 1920 empowering the Minister of Finance to grant relief from the Dutch tax in respect of the part of a taxpayer's income which is derived from outside Holland. This new legislation would appear to apply to income which can be regarded as localised, *i.e.* income from real property and income from business carried on at premises situated outside Holland.

only instance in which this provision has been applied is that of a company which owns mines in the north of Sweden, and exports minerals by a Norwegian port where it owns an extensive equipment. In this case it has been agreed that one-tenth of the property and income should be charged in Norway and the balance in Sweden. In such a case as that of a Norwegian company buying wood in Russia and Finland and selling it in Spain, but having its management and book-keeping in Norway, the Norwegian tax is payable in full.

Switzerland.—In the third article of the series, Dr. Paul Marx, of Zurich, describes what has been done in Switzerland to avoid double taxation. The Federal Constitution of 1848 gave no specific guidance in the matter of conflicts of jurisdiction for taxation purposes between the different fiscal authorities of the Confederation, but the general constitutional principles of equality before the law and freedom of domicile were appealed to by persons aggrieved by a double charge, and a body of decisions of the Federal Council and of the Federal Assembly, based on these principles, was built up. The Constitution of 1874 contained a clause stating that federal legislation would prescribe the measures necessary to prevent double taxation. This clause was, from the beginning, construed as a prohibition of double taxation within the Confederation, and the present practice has developed as the result of decisions based thereon. Various bills drafted from time to time to deal with the matter in detail have failed to become law. In general, the Federal tribunal has declined to attempt the solution of double taxation problems of an international character, and the questions with which it deals are in the main those of inter-cantonal taxation. For real property the general rule is, that the canton in which the property is situated is the one which is entitled to levy tax. In the case of a limited company which owns real property in a canton other than that in which it is established a proportionate part of the share capital and reserve funds must be left out of account in arriving at the liability in the canton in which it has its seat. In the case of a business the area which is competent to impose tax is the one in which the undertaking is carried on. For personal property and income derived therefrom the competent taxing area is the one in which the owner is resident. Officials and employees are chargeable on their salaries at their place of residence irrespective of the place at which they exercise their vocation. The simultaneous taxation of a company and its shareholders does not, it should be noted, come within the scope of the prohibition of double taxation. The question of apportionment for taxation purposes between different authorities of the property and income of a business which extends into several cantons has also from time to time engaged the attention of the Federal tribunal. The more recent decisions are on the general lines that the proportion chargeable in each canton should be computed according to the relative importance in each canton of the establishments and of the various factors of production of the concern.

Italy.—In the fourth article Professor Giovanni Fasolis, of Genoa, deals at considerable length with the provisions of the Italian fiscal laws which bear on double taxation. Space will permit of only the annual direct taxes on income being referred to here.

A decree of November 24, 1919, int oduced, as from January 1, 1921,[1] a new scheme of taxation of income in Italy, and both this and the older system are discussed in Professor Fasolis's article.

The new system comprises a general income-tax ("complementary income-tax") and a tax on different classes or categories of income ("normal income-tax"). In the law relating to these taxes there are no provisions dealing specifically with double taxation, and for the present purpose the provisions which are important are those which define the general scope of the taxes, and thus indicate to what extent the possibility of double taxation exists.

Persons residing in Italy, irrespective of their nationality, are liable to the general income-tax on the whole of their income which is produced in Italy, and on such part of their income derived from abroad as is used in Italy. In the case of non-residents a distinction based on nationality is found, an Italian resident abroad being liable in respect of all income which is produced in Italy, while a foreigner resident abroad is not liable in respect of any Italian income which he spends abroad. Any person, whether an Italian or a foreigner, who resides for part of the year in Italy is liable to the tax on such part of his income as is produced in Italy, and also on any part of his income accruing abroad which is spent in Italy.

The "normal income tax" is defined as applying to "every income existing in the State, to whomsoever it belongs." Within its scope are included not merely such localised classes of income as income derived from land and buildings, and income from industry, commerce, professions, or employments exercised in Italy, but also income resulting from contracts entered into in Italy, pensions, salaries, dividends, interest, etc., paid on account of the State, Provinces, Communes, or any corporate body in Italy, wherever and by whomsoever paid, and in general any income due from a person resident or domiciled in Italy.

The older system of direct taxation, consisting of taxes on land and buildings, and on income from personal property, business, etc. (*richezza mobile*), is similar in scope to the new normal income-tax, so that the decisions of the Courts on the older system will remain of practical interest. In the case of undertakings which have their seat, their centre of organisation and direction, and their most important establishments in Italy, but carry on part of their trading operations abroad, the Courts are inclined to regard as taxable in Italy even the income arising from the establishments abroad, on the ground that the directing mind, which is the cause of production of the income, is situated in Italy. The general

[1] A recent decree has postponed the operation of the new legislation until January 1st, 1922.

drift of the decisions is to hold that an income can be considered as "existing in the State" when the income enjoys the legal protection of the State, or is due from a person domiciled or resident in the State. It has been held that there is liability in respect of the following, among other classes of income: interest on bonds issued and held abroad but secured by a charge on property situated in Italy; income from personal property derived by a foreigner resident abroad by virtue of the will—published in Italy—of a foreigner; salaries paid by an Italian company to employees of a branch situated abroad.

A section of Professor Fasolis's article is devoted to the question of double taxation as between the mother-country and colonies. This matter is of relatively small importance in the case of Italy, but reference may be made to one point of interest in connection with war profits taxation. There is a provision enabling persons who have paid a war profits tax in the colony of Eritrea on profits realised there, and have also paid war profits tax in Italy on the same profits, to obtain a repayment of the latter tax equal to the amount paid in the colony.

THE FRENCH LAW OF BIGAMY.

[*Contributed by* PROFESSOR RENÉ MOREL, *Professeur à la Faculté de droit de Nancy.*][1]

BIGAMY is prohibited in France by Article 147 of the *Code Civil* which forbids the contraction of a second marriage before the dissolution of the first. According to the *droit civil*, the second marriage of a bigamist is null and void. Article 140 of the *Code pénal* punishes with temporary hard labour "whoever being bound by the fetters of marriage shall have contracted a second marriage before the dissolution of the preceding one." The same penalty is incurred by the official who, knowing the existence of the preceding marriage, has lent his ministry for the celebration of the second.

The present communication has not as its object the analysing of the elements constituting the crime of bigamy and the legal difficulties raised thereby. It is proposed here to examine particularly the means which have been adopted by French legislation in order to prevent this breach of law, and search will be made to show how far these methods have been efficacious.

It is first of all necessary to leave out of account the war period of 1914, since the criminal statistics from that date onwards are not available, though it is already certain that the events of that period have in this matter, as in others, acted as a disturbing factor.

As a result of the invasion of a part of French territory, as well as of

[1] Translated by Francis Norris, Esq., Licencié en droit français de la Faculté de droit de Paris.

other circumstances which will be dealt with in this essay, the number of bigamous unions has sensibly increased during the war period, whereas before these unions were relatively rare, and in any case their number during a great many years remained almost stationary. It is, therefore, indispensable,in order to proceed to a scientific examination of the question, to deal for the moment with the period prior to the war, which in reality constitutes the normal period.

Period before the War of 1914.—During the nineteenth century the statistics of bigamy in France give figures of a constant and remarkable regularity. It appears that the number of convictions of bigamy is less than the number of indictments. Between 1881 and 1913, 237 people were tried for bigamy before the *cours d'assises*, while only 132 were convicted—105 having, therefore, been acquitted. One must not, however, imagine that in the case of these 105 the crime of bigamy was not legally established. What is probable, and even certain for those who know the custom of juries, is that in most of these cases the jury, taking into consideration certain circumstances favourable to the accused, gave them the benefit of a verdict of not guilty. The statistics show that indictments for bigamy are fairly rare in France, although there is a slight tendency towards increase during the later years. By establishing the average annual number by quinquennial periods one arrives at the following figures. Annual average of indictments for bigamy: [1] 1881–5, 6; 1886–90, 5·8; 1891–5, 7·6; 1896–1900, 7·2; 1901–5, 6; 1906–10, 8·2. It may be questioned, however, whether these figures of criminal statistics are quite convincing, and whether they correspond exactly to the actual number of bigamous unions.

The statistics indicate the number of crimes whose perpetrators have been prosecuted before the criminal jurisdiction. They show the more or less great activity of the agents entrusted with these prosecutions. But the fact that an infringement of the law gives rise to small numbers of prosecutions does not necessarily imply that this infringement is, so to say, unknown in practice. It is possible that in the majority of cases it escapes the investigations of justice. It is notorious that in France, abortion, which is a frequent crime, gives rise in reality to an insignificant number of prosecutions. Is it not the same with bigamy? From the fact that prosecutions for bigamy are relatively few in number can one conclude with certainty that this crime is one of those which are the most rarely committed in France? That is at least doubtful because the discovery of bigamy is very often only due to chance. The bigamist generally only contracts his second marriage far from his own country of origin, far from localities where he is known, in any case far from the place where he contracted the first union. If, as often happens, he is separated from his first wife, it will be fairly easy for him to conceal his action. In such a case it will only be by a concurrence of exceptional

[1] In addition, during those thirty-three years there have been twenty-one *condamnations par contumace* recorded for bigamy, at the rate of less than one per annum.

circumstances that the offence will be brought to the notice of the "*Ministère public*" (Public Prosecutor).

It would, however, we believe, be inaccurate to be too sceptical with regard to the statistics relating to bigamy. Undoubtedly it cannot be denied that a certain number of bigamous acts remain unknown and escape punishment; but ought one to conclude from this that the number of the acts remaining unpunished is considerable? How can it be explained that in certain countries, where the search for the crime of bigamy has to face the same difficulties as in France, the number of prosecutions for bigamy is much greater than that of the latter country?

It appears, therefore, to be quite legitimate to rely on the statistics to conclude that this species of crime is relatively little developed in France.

What are the reasons which explain this state of affairs? Must one not look for the reasons in the existence of the preventive measures enacted by law. There exists in France a law of August 17, 1897, which amplifies the Napoleonic Code, and which enacts certain measures having as their object the prevention of bigamy. Has this law exercised an influence which has contributed to diminish crime?. Let us first see what the measures taken by this law consist of. For this purpose it is necessary to sketch rapidly the system in existence prior to this law. The Napoleonic Code, which came into force in 1804, made no particular provisions with regard to bigamy. In order to assure in a general way the observation of the conditions of validity of marriage, it enacted that promises of marriage should be made public by the registrar of births, deaths, and marriages. This publicity, which was generally made by means of a notice affixed to the door of the town-hall, had for its object the warning of persons who might know of some impediment to the marriage, notably the existence of a former undissolved marriage which had been contracted by one of the future spouses. Any person was entitled to give notice of this impediment to the registrar. There are even certain persons to whom the Code gives the right to oppose the celebration of a marriage, and this opposition can only be removed by the persons themselves or justice: such is the case of the spouse of one of the future partners who has contracted an undissolved marriage (Art. 172). In addition, the Napoleonic Code requires that the marriage be celebrated publicly and before witnesses, and that it be entered on the registers of the registrar of births, deaths, and marriages, of which every person is entitled to have delivered to him extracts. These measures were discovered to be quite insufficient to prevent attempts to commit bigamy. In effect, the publication of promises of marriage is purely local; in many cases it only takes place in a single parish, that one in which the marriage will be celebrated. Now, as has been proved by experience, time after time the bigamist does not contract his second marriage where his first union was celebrated. The publication of the second marriage takes place, therefore, more often in a more or less distant parish and most probably is unknown to those who are

aware of the situation of the bigamist. No opposition is, therefore, formulated. On the other hand, as the future bigamist introduces himself to the registrar as unmarried, the latter had before 1897 no practical means of verifying this allegation.

The law of 1897, while retaining the system of publication, has organised a much more efficacious means of control by the registrar. The legislator has endeavoured to put the registrar, who is called upon to celebrate the marriage, in the position of knowing for certain the existence of any former marriage which may have been contracted by one of the future partners.

This is the mechanism which has been instituted for this purpose. The law of 1897 requires that mention of the existence of every marriage must be made in the margin of the birth certificate of the spouses. Therefore if the marriage is celebrated by the registrar of the birth-place of the spouses, this officer must automatically make a note of the marriage which he has celebrated on the margin of the birth certificate of each of them. If the marriage is celebrated in a parish other than that in which both or one of the spouses were born, the registrar who has celebrated the marriage must in accordance with administrative procedure notify the registrar of the birth-place of each of the spouses: a note of the marriage is then made by the latter on the birth certificate of the spouses.

As the registry of births, deaths, and marriages is kept in duplicate and one of the duplicates is deposited at the record office of the tribunal of first instance, a similar note is made in the margin of the registry of births deposited at this record office. Consequently, each time that one asks either the registrar of births, deaths, and marriages or the keeper of records for a copy of the birth certificate of a married person, this copy, which is made out in accordance with the register, reproduces a note of the marriage which has been made in the margin of the birth certificate. Now, when two persons appear before a registrar with the object of contracting marriage the latter is obliged to ask each of the future spouses for a copy of his birth certificate. If, therefore, one of the future spouses has contracted a former marriage, the copy of the birth certificate which is handed to the registrar contains a note of this fact. The registrar is in such a case justified in refusing to celebrate the marriage until the future spouse has furnished official proof that his first marriage has been dissolved either by the death of this partner or divorce. The law of 1897 has foreseen a fraud consisting, on the part of a person already married, and desirous of contracting a second marriage before the dissolution of the first, in the production to the registrar of a copy of his birth certificate which was delivered to him prior to his first marriage and which consequently contains no note in the margin of this marriage. In order to prevent this fraud, the law enacts that the birth certificate handed to the registrar in view of the celebration of marriage must not have been issued *more than three months before*, if issued in France, or more

than six months if emanating from a colony or consulate. The registrar can refuse to proceed to the celebration of the marriage and insist on the production of a fresh birth certificate if on the day of the celebration one of the future spouses produces a birth certificate delivered more than 3 or 6 months before, according to the distinction made by the law.

In order to ensure the observation of this enactment the law orders that the copies of the birth certificates must contain in writing the date of their issue. Such is the system organised by French law in order to prevent bigamy. Let us now consider if this law has produced the effect expected of it? A single glance at our criminal statistics suffices to convince us that the law of 1897 has not succeeded in *suppressing* bigamy. Since 1897, as before, the *cours d'assises* have had to try cases of bigamy; the number of indictments for bigamy has not diminished since 1897; it has rather increased. What is this state of affairs due to? Does this mean that the measures enacted by the law of 1897 are absolutely inefficacious? First of all let us leave out of account the difficulties and the delays of application of the system imagined by the law. Let us suppose that the legal measures are perfectly observed in practice. Even if well applied it is evident that the law of 1897 could not completely suppress bigamy. Here are notably a certain number of cases in which the measures enacted by this law have no effect.

(1) An individual gets married, and then in less than three months wishes to contract a second marriage while the first has not been dissolved. It is possible for him to produce to the registrar a birth certificate delivered prior to his first marriage and, therefore, containing no mention of this, although it fulfils the requirements of the law, which enacts that the birth certificate shall not be dated more than three months before. The registrar can thus be deceived whilst the law has been respected. This hypothesis is, however, hardly a practical one: it is hardly likely that a person would contract two marriages in such a short space of time.

(2) An individual, wishing to contract a bigamous marriage, can falsely attribute to himself the certificate of an unmarried person. In this case bigamy is coupled with the crime of fraud. The registrar may be disarmed by such a fraud, and in any case the law of 1897 does not come into play on this hypothesis.

(3) An individual for some reason or the other cannot obtain his birth certificate. The law in such a case is satisfied by the production to the registrar of an *acte de notoriété* delivered by a justice of the peace on the declaration of a certain number of individuals. Perhaps this individual is already married? The registrar will not be warned of this, since he will not have in his hands the birth certificate which would be susceptible of informing him.

(4) Lastly, the accomplishment of the crime of bigamy is greatly facilitated when the first marriage has been contracted outside French territory either by a foreigner or even by a Frenchman. This is, however, a complex matter on which we cannot dwell here: let it suffice to say that

neither the enactments of the French law nor the existence of certain international conventions constitute a sufficient preventive means.

These examples prove that the law of 1897 alone could not completely stop bigamy in France. It must be added that in practice, as a result of certain defects in its application, this law does not produce all the effects that might be expected of it. On account of the slowness and the multiplicity of the transmissions, the noting of marriages in the margin of birth certificates only operates with a certain delay. But this is a situation which can be improved and it is not necessary to render the law itself responsible.

Does this mean that the measures enacted by the law of August 17, 1897, have had no result? Some people have believed so, and, judging only by the figures, one is inclined to adopt their opinion. In effect, the statistics do not reveal to us, in the years which have followed the new law, any notable change with reference to the state of prior affairs. Does not this sufficiently prove the slight efficacy of the legal enactments?

In our opinion, however, it would not be right to hasten to proclaim the failure of the law of 1897. And first it is undeniable that this law enables the registrar to obtain information as to the situation of the future partners, which before 1897 he could hardly have got except by the good-will of the persons interested. How many people to-day could not contract a bigamous marriage who could have done so before?

If the law of 1897 has been efficacious, it will be said, how is it possible to understand that from the date of its promulgation the statistics have not shown a marked decline in the number of prosecutions for bigamy? How can the quinquennial average of the period 1906–10 be greater than that which it was, for example, in the period 1891–95 (8·2 instead of 7·6)?

To this one must reply that figures are only of value when interpreted. Different causes allow an explanation of the maintenance of prosecutions for bigamy at the same level as prior to 1897. First, there is the increase in population, above all owing to the influx of foreigners—a secondary cause, it seems, but one which must, however, be taken into account. There is also the ever-growing facility of travel, a reason susceptible of favouring bigamy, which presupposes the departure from home of the bigamist. There is above all the very notable increase in *nuptialité* which has manifested itself in France during these latter years. The yearly number of marriages contracted in France, which from 1881 to 1897 had never exceeded the figure of 290,000, has sensibly increased since that date; it has notably gone to 305,000 in 1905, 306,000 in 1906, 314,000 in 1907, 316,000 in 1908, 308,000 in 1909, 1910, and 1911, 312,000 in 1912, and 299,000 in 1913. There is nothing rash in supposing that there exists a certain proportion between the figures of marriages and that of bigamous unions. Therefore, as the increase in marriages has normally caused a corresponding increase in the number of cases of bigamy, one can well explain to oneself that, in spite of the law of 1897, the figures of the annual

statistics have remained at their former level and have even reached a slightly higher one. One can legitimately maintain that without the law of 1897, which has acted as a brake, this level would be considerably higher. Certain indications allow one in effect to suppose that without the law of 1897 we should have seen an increase of bigamy. It is certainly difficult to bring direct proof to bear in support of this statement, but the experience gained during the war of 1914 singularly confirms this hypothesis. While during the war one has been led by events to pay less attention to the requirements of the law, one has been able to note a very sensible increase in the number of cases of bigamy. Is not this the best proof that the law of 1897 constitutes a barrier before which certain individuals have been obliged to retire and which it would be very imprudent to suppress?

One must, however, take care not to exaggerate the importance of the law of 1897. A place must be made for other factors susceptible of influencing crime in this matter. Let us not lose sight of the fact that before the law of 1897 bigamy was fairly unusual in France. What are the reasons which allow one to explain this state of affairs? Is the Frenchman averse to this crime by temperament? Or do there not exist, rather, certain causes which would act here as factors of diminution of this offence? Amongst these factors there is one which does not seem negligible: it is the existence in France of a numerous rural population. As is shown by our statistics, the great majority of bigamists are recruited amongst the urban population. The peasant who does not leave his village and remains attached to the soil which has witnessed his birth is known to those about him. It is almost impossible for him, in the view and to the knowledge of all, to contract a second marriage before the dissolution of the first. The same observation may be made with respect to the small localities which are numerous in France. Bigamy is on the contrary facilitated in towns, above all in large towns, whose population is constantly changing and where one often does not even know one's neighbours.

Another factor which must, it seems, be taken into account is the existence of divorce and the facility accorded to married couples of breaking their union. What would be the use of a married person committing the crime of bigamy, since it is relatively easy for him to obtain a divorce, and once the divorce is pronounced he will be able to contract a valid second marriage? However, this manner of looking at the question is subject to an objection. Divorce was only re-established in France in 1884. If one attributes to divorce the virtue of preventing bigamy, it is difficult to understand that the number of bigamous acts was not greater in the period prior to 1884, during which divorce did not exist. On the other hand, the increase in the number of divorces should have corresponded with a diminution in the number of cases of bigamy: whereas the statistics show that nothing of the kind has happened. It seems reasonable enough to hold, with regard to divorce, the same argument as with regard to the law of 1897. Doubtless, the

figures of the statistics have not changed, but there is reason to suppose that in one period, where morality has rather decreased, if divorce did not exist, cases of bigamy would be more numerous. The increase in the number of divorces which from other points of view cannot be too much deprecated exercises here a preventive influence.

To explain the rarity of bigamy one can think of another factor, the multiplicity of "free unions," *unions libres*. He who is weary of conjugal life, has he not at his disposal the great road of escape provided by *l'union libre*? And why should he incur the risk of being sentenced to hard labour when he can establish a home without greater liability than the possibility of a conviction for adultery? It appears in effect difficult to deny that *l'union libre* is of a nature to divert certain individuals from the crime of bigamy. But here again we meet with the same objections: if one takes into account the fact that the number of *unions libres* is increasing, it seems that this increase should have brought about a diminution of bigamy. The statistics, however, do not bear this statement out. Here again one may reply that the figures of the statistics have only a relative value: it is probable that without *l'union libre* bigamy would have increased in notable proportions. On this point again a factor, which is in itself immoral and disastrous from the social point of view, would have a favourable effect.

War Period 1914–18.—Although one is not yet in possession of official figures it is already certain that cases of bigamy have multiplied during the period 1914–18. This multiplication of criminality is due to several causes.

(1) During the first weeks following mobilisation, instructions were given with the effect of simplifying the preliminary procedure of marriage: it was intended by this means to allow certain of the mobilised to contract marriage before rejoining their corps. With this object the future partners were excused from producing the papers usually required, notably their birth certificates; in certain town-halls any document establishing identity was considered sufficient. The provisions of the law of August 17, 1897, were therefore unobserved in numerous cases. It has now been proved that a fairly large number of individuals profited by these facilities in order to contract a bigamous union. Some of these unions remain unknown: some were soon discovered: it happened notably that both the wives of the bigamist claimed the separation allowance paid to the wives of mobilised soldiers or, in case of death, both of them put in an application for the pension payable to a widow.

(2) A whole part of French territory having been occupied by the enemy, the natives of the invaded regions who were in non-occupied territory were unable to obtain extracts from the acts of their civil status (*état civil*) which were necessary, notably their birth certificates. Legislative measures enabled them to replace by *actes de notoriété* the absence of the acts of their civil status. Now these *actes de notoriété* are far from having the same value as the acts of their civil status (*état civil*). Here again the dispositions of the law of August 17, 1897, have not been executed.

Certain natives of the occupied territory profited by this in order to conceal the existence of a prior marriage and contract a fresh union.

(3) Lastly, the constant movements of mobilised soldiers, who were often transported far from their native country, and in addition the presence of numerous foreign soldiers, were not without an effect in an increase of bigamy.

Here again these facts are certain, although it is not yet possible to base them on statistics. As a result of an inquiry which we have made of a qualified person, it appears that during the year 1919 *thirty* cases of bigamy were tried by a jury, that is to say more than three times the figure of a normal year. There is every reason to think that this increase is purely temporary and will come to an end with the causes which have given it birth.

Conclusion.—It appears to be proved that the crime of bigamy can be, if not suppressed, restricted by a good organisation of the civil status (*état civil*), notably by a system of measures analogous to those of the French law of 1897, which enable the registrar of births, deaths, and marriages to be informed of the matrimonial condition of the future spouses. The preferable solution would be the organisation in each country of a civil file system (*casier civil*) instituted on the model of the judicial files (*casiers judiciaires*) which would have as its object the centralisation at the locality of birth of every person of all information concerning his civil status (*état civil*). All the events susceptible of effecting the status and the capacity of a person would be transmitted to the civil files (*casier civil*), where it would be easily possible to find them owing to a system of slips and notes classified in alphabetical order. This system, which has been long promised in France, was outlined by the law of August 17, 1897, which ordered that marriages should be noted in the margin of birth certificates ; but much remains to be done in order to realise the ideal organisation of the civil files (*casier civil*). When each individual country has thus organised its civil files (*casier civil*) there remain to be taken measures in order to prevent what one may call " international bigamy " ; that is to say, the possibility of a person who is already married in one State contracting a bigamous marriage on the territory of another State. For this purpose international " ententes " would be necessary in order to bring about between civilised countries

(1) The exchange of acts of civil status concerning their citizens.

(2) The delivery by each State of certificates to those of its citizens who desire to contract a marriage abroad, etc.

Doubtless, this path is already being followed ; but there remain on this point many gaps and imperfections. The day when each country has organised in a practical way its civil status (*état civil*) and, owing to *ententes* between the different States, a sort of international civil status has been established, one will be able to affirm that the crime of bigamy will become as rare as are to-day certain diseases which ravaged populations in the Middle Ages and which progress and hygiene have succeeded in nearly completely suppressing in our countries.

THE NEW GOVERNMENT OF INDIA ACT.

[*Contributed by* R. FEETHAM, ESQ.]

Two features of the Government of India Act, 1919,[1] may perhaps be regarded as of special interest to the student of Comparative Constitutional Law:

(1) The new form of Executive Government established in the major provinces, which are classified as "Governors' Provinces"; and

(2) The method adopted for the distribution of powers between the Central and Provincial Governments and Legislatures.

New Form of Provincial Government.—The most criticised part of the scheme of Indian Constitutional Reforms, as set forth in the Joint Report made in 1918 (Cd. 1909) by the Secretary of State and the Viceroy (commonly designated the "Montagu-Chelmsford Report") was the plan for a new form of Provincial Government, which came to be known as "Dyarchy." This plan represented an attempt to find a new solution for an old problem. The problem is one which has often had to be faced in dealing with the constitutional development of colonies or dependencies, namely, the problem of providing a form of government which will enable a colony or dependency to pass smoothly through the transitional stage from official to popular government. The old solution of this problem is to establish a Legislature consisting entirely or mainly of elected members, and to endow such a Legislature with partial control over the action of an official Executive which is not removable at the will of the Legislature. This form of government, which has come to be known as "representative," as distinct from "responsible" government, has existed at some stage in the constitutional development of almost all the colonies which now form portions of the self-governing Dominions. A comparatively recent and well-known example of a constitution establishing this form of government is the Constitution known as the "Lyttelton Constitution," provided for the Transvaal three years after the conclusion of the South African War, and embodied in the Transvaal Constitution Letters Patent, 1905. It will be remembered, however, that the Campbell-Bannerman Government decided to dispense with any transitional stage in the case of the Transvaal and the Orange River Colony, and therefore abrogated the Lyttelton Constitution before it came into operation, and granted to the Transvaal full responsible government by new Letters Patent issued in 1906.

When the Secretary of State went to India in 1917, for the purpose of considering with the Viceroy the best means of giving effect to the

[1] References to sections are, unless otherwise noted, references to the Government of India Act, 1919. By virtue of s. 45 and the Second Schedule the provisions of this Act are now incorporated in the "principal Act," *i.e.* the Government of India Act, 1915, as amended by the Government of India Amendment Act, 1916.

announcement made in the House of Commons on August 20, 1917, that the goal of British policy in India was "the Progressive Realisation of Responsible Government in India as an integral part of the Empire," one of the most important schemes of constitutional reform awaiting their consideration was the scheme put forward jointly by the Indian National Congress and the All India Moslem League—the two leading Indian political organisations. This scheme was, in effect, a scheme for representative government. It proposed to establish legislative bodies in each province, consisting as to four-fifths of elected, and as to one-fifth of nominated members. The Provincial Governments were to consist of a Governor with a Council, of which one-half was to consist of Indians, elected by the Provincial Legislative Council, and the other half of nominated members, who, it was contemplated, would be Europeans, though it was stipulated that they should not ordinarily be appointed from the members of the Indian Civil Service.

It is unnecessary to go into the details of these proposals, which went further than any precedent in the direction of giving a popular Assembly control over the actions of an Executive, including substantial official element which it has no power to displace. These proposals were carefully examined in the Montagu-Chelmsford Report, and were severely criticised on many important points of detail. In principle, the scheme was condemned on the ground that it was unsound that the Legislature and the Executive should derive their power from, and be responsible to, different authorities. "We find," say the authors of the Report,

"in these proposals no connecting rod between the executive and the legislative wheels of the machine which will ensure that they will work in unison. There are powerful factors working the other way in the differences of race and of political ideas. We must anticipate divergence, and the only question is whether that divergence will be fatal to good government. Upon this point we defer to the experience of history, and we draw from it the plain conclusion that, if the government is to be carried on, legislature and executive must in essentials be in harmony. . . . An Executive which is independent of its Legislature, as the Indian executives have hitherto been, can carry on the government in virtue of authority derived from without: a party Executive can govern because it interprets the will of the people as represented by the Assembly; but wherever, as in Canada or Malta, attempts have been made to set up an irremovable Executive and a popular Assembly, acute conflict has ensued, and has resulted in either an advance to popular government or a return to autocracy.

The Report quotes a striking passage from Professor Lowell's *Government of England*, in which, after giving a résumé of the Constitutional History of Jamaica and Malta, the author sums up his condemnation of representative government in the following emphatic terms:

Parliamentary government avoids dead-locks by making the Executive responsible to the Legislature. Presidential government limits dead-locks, because all the organs of the State must ultimately submit to a superior tribunal—the electorate of the nation. But a Legislature elected by the

people, coupled with a Governor appointed by a distant power, is a contrivance for fomenting dissensions and making them perpetual.[1]

The authors add their own conclusion with reference to the special circumstances of India:

> We believe that in India, where the two sides are divided by race and also by differences of standpoint, the discord would be much more serious than it has ever been in the Empire's history. We can see no prospect whatever ahead along the road which we are invited by the Congress-League to take but embittered and dangerous dead-lock; to be resolved, when it arose, only by a plunge forward into parliamentary government at once, or by reversion to autocratic methods.

Having thus condemned the proposal to apply to India such a plan of representative Government, the Report states the following conclusion:

> If responsible government cannot be conceded at once, as indeed the scheme implies, and if some measure of responsibility is yet to be given, then means must be found of dividing the sphere of administration into two portions, and for each of these there must be a part of the Executive which can in the last resort secure its way from a legislative organ which is in harmony with it; and there must also be means of securing that both halves of the machine work together.

In accordance with the conclusions thus stated, a scheme was elaborated in the Report which has now been put into statutory shape in the Government of India Act, 1919. The official memorandum on the Bill as introduced thus describes the new form of executive government adopted in the provinces:

> The announcement of August 20, 1917, was based on the principle that the goal of responsible government is to be reached by a gradual transfer of responsibility to representatives of the people. A new type of executive government is proposed for the provinces for the purpose of enabling effect to be given to this plan of gradual transfer of responsibility. The new Provincial Governments are to be of a composite character, and to contain both an official and a non-official, or popular, element. On the official side they will be modelled on the existing Governments of the Presidencies, which have "Council Government." Under this system the Government is carried on by a Governor assisted by an Executive Council,[2] and official acts are performed in the name of the "Governor-in-Council." On the popular side the new Governments will consist of the Governor and of Ministers who will be elected members of the Legislative Council appointed by the Governor. For the purpose of allotting to each section of this dual government its own sphere of duty, the work of the Provincial Government will be divided into two parts: certain subjects, to be called "transferred subjects," will be

[1] Lowell, *Government of England*, 1908, vol. ii. p. 416.

[2] The maximum number of members of a provincial Executive Council is four (Government of India Act, 1915–16, s. 47 [1]). The Joint Committee express the opinion that the normal strength of an Executive Council under the new system need not exceed two members.

administered by the Governor acting with the Minister [1] in charge of the subject, while other subjects, to be called " reserved subjects," will remain in charge of the Governor-in-Council. Each side will thus have its own share in the conduct of the government of the province, and the respective shares are to be defined in such a way as to fix on each section responsibility for its own work, while co-ordination will be achieved by the influence of the Governor, who will be associated with both sections of the Government, and will have power to summon meetings of his Executive Council and his Ministers for the purpose of joint deliberation whenever he sees fit to do so. Future progress will be made by the transfer of further portions of the field of administration from the official to the non-official section of the Government after periodical surveys of existing conditions by Commissions appointed by Parliament.

The elected members of Legislative Councils, from whom the Governor is to choose his Ministers, will form the majority of the Legislative Council in each Governor's province. The Act provides (s. 7 [2]) that these Councils are to contain at least 70 per cent. of elected members, and while the remaining 30 per cent. are to be nominated, not more than 20 per cent. of the total number of members may be officials. Rules made under the Act prescribe the qualifications for the franchise, and provide for the delimitation of constituencies in the different provinces on the lines of proposals worked out in India by Lord Southborough's Franchise Committee. These proposals were examined by the Joint Committee of Lords and Commons, presided over by Lord Selborne, to which the Bill was referred, and were adopted with certain modifications. The total number of electors in the eight provinces was estimated by the Franchise Committee at about 5,000,000, *i.e.* rather more than 2 per cent. of the total population.

The Act provides that the division of " subjects " of administration for each province into the two classes, " reserved " and " transferred," in accordance with the scheme outlined above, is also to be made by rules. A proposed scheme of division was worked out by the other " Southborough Committee " in India, and was also examined by the Joint Committee, and provisionally approved, as amended after consultation with the India Office. This scheme provides for the allocation to " the Governor acting with Ministers " (the popular side of the Government) of the following subjects among others, as " transferred " subjects—Local Self-government, Medical Administration, Public Health, Education and " Excise " (a term which covers the administration of the liquor laws), while to the " Governor-in-Council " (the official side of the Government) are reserved, *inter alia*, the subjects of Land Revenue, Irrigation, Administration of Justice, Police, Prisons, and Forests (except in Bombay, where " Forests " are transferred).

Apart from the actual division of subjects into the two classes,

[1] An amendment was made in the Bill, as noted below, substituting the plural for the singular, " Ministers " for " Minister," and thus recognising the principle of collective responsibility of Ministers.

" transferred " and " reserved," many difficult questions presented themselves in the process of working out the statutory provisions for the new system of provincial government. The Joint Committee of the two Houses made a careful examination of these problems, and, while generally accepting the proposals contained in the Montagu-Chelmsford Report, and embodied in the Bill as presented to the House of Commons, introduced some important amendments, and also made recommendations as to the principles which should be accepted as the basis of constitutional practice under the new provincial regime. The main problems considered in relation to this feature of the Reforms scheme may be grouped under the following heads :

(1) Working of New Provincial Governments. (2) Provincial Legislation. (3) Control of Provincial Finance.

Working of New Provincial Governments.—As in the case of other constitutions of British origin, the working of the new system of provincial government devised for the provinces of India will depend at least as much on the acceptance of implied constitutional conventions as on compliance with express statutory provisions. Those paragraphs of the Joint Committee's report which discuss the constitutional principles implied in the provisions of the Bill, and the conventions which should be adopted to give due effect to them, may be regarded as in some sense an authorised interpretation, and supply a valuable and much-needed commentary on the text.

The Committee state thus at the outset the " simple and indefeasible theory " on which they have proceeded in recommending changes in the Bill :

> Ministers who enjoy the confidence of a majority in their Legislative Council will be given the fullest opportunity of managing that field of government which is entrusted to their care. In their work they will be assisted and guided by the Governor, who will accept their advice and promote their policy whenever possible. If he finds himself compelled to act against their advice, it will only be in circumstances roughly analogous to those in which he has to override his Executive Council[1]—circumstances which will be indicated in the instrument of instructions furnished to him on his appointment by His Majesty. On the other hand, in and for that field of government in which Parliament [*i.e.* the Imperial Parliament] continues to hold him responsible, the provisional Governor-in-Council will remain equipped with the sure and certain power of fulfilling that responsibility.

While urging that the Governor should insist upon free consultation between both halves of his Government in all important matters of common interest, the Committee would not allow such joint consultation to obscure the separate responsibility of the two parts of the administration.

> Each side of the Government will advise and assist the other ; neither will control or impede the other. The responsibility for administrative and

[1] *Cf.* Government of India Act, 1915–16, s. 50 (2).

legislative action in their own field will be fixed beyond possibility of doubt on ministers and on the majorities of the provincial legislatures which support them ; and they will be given adequate power to fulfil their charge. Similarly within that field for which he remains accountable to Parliament, the responsibility for action must be fixed on the Governor-in-Council, and he must possess unfailing means for the discharge of his duties.

The Committee decided in favour of recognising from the start on the face of the Bill itself the principle of the collective responsibility of Ministers. The Bill as introduced spoke (clause 1 [1] [d]) of transferring subjects " to the administration of the Governor acting with the Minister in charge of the subject." This was amended to read " to the administration of the Governor acting with Ministers appointed under this Act." The Report points out that in no province will there be need for less than two Ministers, while in some provinces more will be required.

The appointment of Ministers by the Governor is dealt with in s. 4 of the Act, which provides that no official shall be eligible for appointment as Minister, that the tenure of office shall be during the Governor's pleasure, and that " no Minister shall hold office for a longer period than six months, unless he is or becomes an elected member of the local Legislature." [1]

The constitutional relation between the Governor and his Ministers is defined in the same section as follows :

> In relation to transferred subjects, the Governor shall be guided by the advice of his Ministers, unless he sees sufficient cause to dissent from their opinion, in which case he may require action to be taken otherwise than in accordance with that advice : Provided that rules may be made under the principal Act for the temporary administration of a transferred subject where, in cases of emergency, owing to a vacancy, there is no Minister in charge of the subject, by such authority and in such manner as may be prescribed by the rules (s. 4 [3]).

It will be observed that the proviso to this subsection enables the Governor to provide, subject to rules, for the temporary administration of a transferred department when a ministerial post is vacant, so as to avoid the risk of breakdown at a time of political crisis, in case it should be found that the traditional axiom, that in any event the King-Emperor's Government must be carried on, has not yet taken sufficiently deep root in the minds of Indian political leaders.

In commenting on this section the Committee state their view of the position as follows :

> A Minister will have the option of resigning if his advice is not accepted by the Governor ; and the Governor will have the ordinary constitutional right of dismissing a Minister whose policy he believes to be either seriously at fault or out of accord with the views of the Legislative Council. In the last resort the Governor can always dissolve his Legislative Council and choose new Ministers after a fresh election ; but, if this course is adopted, the Committee

[1] Cf. South Africa Act, 1909, s. 14, and Commonwealth of Australia Constitution, s. 64.

hope that the Governor may find himself able to accept such views as his new Ministers may press upon him regarding the issue which forced the dissolution.

The Act provides further (s. 6) that, while all orders and proceedings of the Government are to be in the name of "the Government of the Province," there is to be a distinction in form between orders relating to transferred subjects and other orders, so that it may be apparent, on the face of an order, whether it has been made by the "Governor acting with Ministers" or by the Governor-in-Council.

It should be noted, in this connection, that no question can be raised in a Court of Law as to which side of a provincial government has jurisdiction to deal with a particular matter (s. 16): provision is to be made by rule for the settlement of doubts as to whether or not a matter relates to a transferred subject (s. 1 [2] [v.]), and it is contemplated, according to the official memorandum on the Bill, that the Governor himself will be given authority to settle any question of disputed jurisdiction as between the two sections of his Government.

The Committee give the following picture of the detailed working of this composite government:

There will be many matters of administrative business, as in all countries, which can be disposed of departmentally; but there will remain a large category of business, of the character which would naturally be the subject of Cabinet consultation. In regard to this category the Committee conceive that the habit should be carefully fostered of joint deliberation between the members of the Executive Council and the Ministers, sitting under the chairmanship of the Governor. There cannot be too much mutual advice and consultation on such subjects; but the Committee attach the highest importance to the principle that, when once opinions have been freely exchanged, and the last word has been said, there ought then to be no doubt whatever as to where the responsibility for the decision lies. Therefore, in the opinion of the Committee, after such consultation, and when it is clear that the decision lies within the jurisdiction of one or other half of the Government, that decision in respect of a reserved subject should be recorded separately by the Executive Council, and in respect of a transferred subject by the Ministers, and all acts and proceedings of the Government should state in definite terms on whom the responsibility for the decision rests. It will not always, however, be clear, otherwise than in a purely departmental and technical fashion, with whom the jurisdiction lies in the case of questions of common interest. In such cases it will be inevitable for the Governor to occupy the position of informal arbitrator between the two parts of his administration; and it will equally be his duty to see that a decision arrived at on one side of his Government is followed by such consequential action on the other side as may be necessary to make the policy effective and homogeneous.

On the delicate question as to the attitude towards one another of Members of the Executive Council and Ministers in public debate, the Committee advise as follows:

In the debates of the Legislative Council members of the Executive Council should act together and Ministers should act together, but members of the

Executive Council and Ministers should not oppose each other by speech or vote; members of the Executive Council should not be required to support either by speech or vote proposals of Ministers of which they do not approve, nor should Ministers be required to support by speech or vote proposals of the Executive Council of which they do not approve; they should be free to speak and vote for each other's proposals when they are in agreement with them. All other official members of the Legislative Council should be free to speak and vote as they choose.

Provincial Legislation.—The authors of the Montagu-Chelmsford Report fully recognised that, if there was to be a true division of responsibility between the official and the popular side of a provincial Government for the discharge of executive functions, it was essential that each side of the Government should have "a legislative organ in harmony with it" (par. 215).

In view of the decision to reconstitute the Legislative Councils of the provinces with substantial elective majorities, how was the essential requirement to be met in the case of the official side of the Government?

The proposal put forward in the Report, and embodied in substance in the Bill as introduced, was that the Governor should have power to certify that a particular measure was "essential to the discharge of his responsibility for the peace or tranquillity of the province," or "to the discharge of his responsibility for reserved subjects," and that, upon such certificate being given, the measure affected should be referred to a "Grand Committee" of the Council, constituted with a majority of nominated members selected by the Governor, which should have power to deal with the Bill in place of the Council itself. This plan was, however, rejected by the Joint Committee for two reasons: first, because it did not, in their opinion, guarantee to the Governor adequate power of securing legislation in a crisis, and, secondly, because it involved in effect a continuance of the system of the "official bloc," by which provincial Governments have hitherto been accustomed to secure the passage of measures through their Legislative Councils.

The objections to that system, which the Committee describe as "a cause of great friction and heartburning," are set out at length in the Montagu-Chelmsford Report (pars. 85–87). The Joint Committee preferred a more direct method of dealing with the difficulty by conferring on the Governor himself power to pass any Bill relating to a reserved subject which he certifies as essential, and which the Legislative Council fails to pass in the form which he recommends (s. 13). Bills so passed on the authority of the Governor are to be reserved, except in cases of emergency, for the signification of His Majesty's pleasure, and are to be laid for eight days on the table of each House of Parliament before being presented to His Majesty for assent.

In addition to the power of affirmative legislation with regard to reserved subjects, the Governor is given a negative power to stop proceedings in his Legislative Council in relation to any Bill or amendment to

a Bill, on certifying that such Bill or amendment " affects the safety or tranquillity of his province or any part of it or of another province " (s. 11 [5]).

Control of Provincial Finance.—The decision to entrust the Legislative Council of each province with a wide measure of control over the provincial budget involved the adoption of an arrangement similar to that outlined above in the case of legislation, for the purpose of enabling the Governor-in-Council to obtain supply essential for the administration of reserved subjects. S. 11 of the Act requires the submission to the Council of the Government's annual appropriation proposals in the form of " demands for grants," subject to the exception of certain important items—including interest and sinking fund charges on loans and salaries and pensions of the higher officials (s. 11 [3]). But in the case of demands relating to reserved subjects the Governor may certify " that the expenditure provided for by the demand is essential to the discharge of his responsibility for the subject," and such certificate confers on the Governor-in-Council authority to incur the certified expenditure, notwithstanding the refusal of the Legislative Council's assent to the grant or any vote reducing the amount (s. 11 [1] [2] [*a*]). The Governor is further given power " in cases of emergency to authorise such expenditure as may be in his opinion necessary for the safety or tranquillity of the province, or for the carrying on of any department " (s. 11 [1] [2] [*b*]).

A more difficult problem presented itself as to the method to be adopted of dealing with finance inside the provincial Government itself, and of adjusting as between the Executive Council and Ministers the rival claims of reserved and transferred subjects.

The proposal of the Montagu-Chelmsford Report was that the revenue from reserved and transferred subjects should be thrown into a common pool, from which the two halves of the Government would draw funds for their respective requirements, and that the amount to be drawn by each should be settled annually by the Executive Government as a whole, the Governor being the deciding authority where the Executive Council and Ministers failed to agree.

> The first charge on provincial revenues will be the contribution to the Government of India ; and after that the supply for the reserved subjects will have priority. The allocation of supply for the transferred subjects will be decided by the Ministers. If the revenue is insufficient for their needs the question of new taxation will be decided by the Governor and the Ministers (M. C. Report, par. 256).

The Government of India, in their Letter of March 5, 1919 (Cmd. 123), criticised these proposals as inconsistent with the basic principle of division of responsibility, and set forth an alternative scheme for a " separate purse " system, under which each section of the Provincial Government would have its own purse, instead of both sections drawing on a joint purse.

The Act as passed provides (s. 1 [1] [*d*]) that rules may be made " for

the allocation of revenues or moneys " for the purpose of the administration of transferred subjects—a provision which in effect leaves open the question as to whether the system of a joint purse or of two separate purses is to be adopted.

The subject was, however, considered at length by the Joint Committee, who, while not recommending the general adoption of the separate purse system, considered that the Governor of each province should have power to make an allocation, for a given period, of revenue and balances between the two sides of his Government, if he found that circumstances rendered such an allocation expedient. The rule-making power, already quoted, enables effect to be given to this recommendation.

The views of the Joint Committee on this important subject are stated in their Report as follows:

The Committee have given much attention to the difficult question of the principle on which the provincial revenues and balances should be distributed between the two sides of the Provincial Governments. They are confident that the problem can readily be solved by the simple process of common sense and reasonable give-and-take, but they are aware that this question might, in certain circumstances, become the cause of much friction in the Provincial Government, and they are of opinion that the rules governing the allocation of these revenues and balances should be framed so as to make the existence of such friction impossible. They advise that, if the Governor, in the course of preparing either his first or any subsequent budget, finds that there is likely to be a serious or protracted difference of opinion between the Executive Council and his Ministers on this subject, he should be empowered at once to make an allocation of revenue and balances between the reserved and transferred subjects, which should continue for at least the whole life of the existing Legislative Council.[1] The Committee do not endorse the suggestion that certain sources of revenue should be allocated to reserved, and certain sources to transferred subjects, but they recommend that the Governor should allocate a definite proportion of the revenue, say, by way of illustration, two-thirds to reserved and one-third to transferred subjects, and similarly a proportion, though not necessarily the same fraction, of the balance. If the Governor desires assistance in making the allocation, he should be allowed at his discretion to refer the question to be decided to such authority as the Governor-General shall appoint. Further, the Committee are of opinion that it should be laid down from the first that, until an agreement which both sides of the Government will equally support has been reached, or until an allocation has been made by the Governor, the total provisions of the different expenditure heads in the budget of the province for the preceding financial year shall hold good.

The Committee desire that the relation of the two sides of the Government in this matter, as in all others, should be of such mutual sympathy that each will be able to assist and influence for the common good the work of the other, but not exercise control over it. The budget should not be capable of being used as a means for enabling Ministers or a majority of the Legislative

[1] The life of a Legislative Council is three years, subject to the Governor's power of dissolution, and to an extension for a further period of one year in special circumstances (s. 8 [1]).

Council, to direct the policy of reserved subjects; but, on the other hand the Executive Council should be helpful to Ministers in their desire to develop the departments entrusted to their care. On the Governor personally will devolve the task of holding the balance between the legitimate needs of both sets of his advisers.

It should be noted that under s. 1 (2) (iii.) of the Act rules may be made to provide " for constituting a finance department in any province " and regluating its functions; and the Joint Committee state that they " attach the greatest importance to the formation in each Provincial Government of a strong department of Finance, which will serve both sides of the Government alike."

With regard to the question of taxation, there is no provision in the Act imposing special responsibility for preparing new taxation on the popular side of the Government, as was proposed in the Montagu-Chelmsford Report in the extract quoted above. The Joint Committee confine themselves on this head to emphasising the importance of consultation and agreement between the two sections of the Government with regard to any proposals for new taxation laid before the Legislature.

Future Changes.—The new form of Provincial Government in the major provinces of India, which has now been outlined, is avowedly transitional in its character. One of the chief merits claimed for it is that it lays down lines upon which ordered and gradual progress can be made, as additional subjects are transferred, towards the ultimate goal of complete responsible government in the provinces. The Act provides (s. 41) that at the expiration of ten years after its passing a Commission shall be appointed, the personnel of which will require parliamentary approval, " for the purpose of inquiring into the working of the system of government, the growth of education, and the development of representative institutions in British India, and matters connected therewith "; and this Commission is to report—

as to whether and to what extent it is desirable to establish the principle of responsible government, or to extend, modify, or restrict the degree of responsible government then existing.

The periodical survey of conditions in India by such Commissions is a vital element in the scheme for " the gradual transfer of responsibility " as set out in the Montagu-Chelmsford Report. The Joint Committee recommend " that no changes of substance in the constitution, whether in the franchise, or in the lists of reserved and transferred subjects or otherwise, should be made in the interval " before the first enquiry is held.

THE MEETING OF THE INTERNATIONAL COUNCIL OF WOMEN.

[*Contributed by* Miss M. Cécile Matheson.]

The International Council of Women is perhaps hardly as well known to the general public as its importance would warrant. Lady Aberdeen, its President for more than twenty years, wrote of it recently as a League of Nations in being and in operation, and, although it has no statutory powers, it may certainly be said to have paved the way for the "League of Nations idea" among those women of the world who are practical workers in schemes to promote the welfare and progress of women and children. These women thought the quinquennial meeting held at Kristiania last September important enough both to bring them together from the ends of the earth and to transcend all the enmities of recent years. Thus, the greatest amity and unanimity of purpose prevailed throughout the sittings and meetings of the assembly, in conjunction with the facts that war-sufferings and war-work naturally occupied a prominent place in all the reports presented, and that the several delegations never abated for an instant their sense of distinctive nationality. The atmosphere of the Council was a convincing refutation of the heresy so often advanced that patriotism and the international sense are incompatible, and, even hostile, sentiments.

Twenty-eight National Councils of Women were represented, and several of the delegates acted as the official representatives of their respective governments. The National Councils of Iceland, Ukraine, Jugo-Slavia and Uruguay were among those represented for the first time, and reports from China, Czecho-Slovakia and South America, show that the membership will probably be considerably increased when the next quinquennial meets in 1925.

Among the chief subjects of discussion were the League of Nations, Education and Child-Welfare, Public Health, the Equal Moral Standard, the Position of Women and Local Option. A good many of the resolutions were expressions of opinion or agreements to work for action already sanctioned by established law or custom. Such were those concerned with the extension of the League of Nations, the appointment of women to its offices, the needs of the famine-stricken areas and the training of young citizens in a knowledge of the laws of their country. On many of the resolutions, there was almost unanimous agreement, a remarkable fact when we consider the diversities of nationality present, and the equally diverse sources of the various resolutions.

Perhaps, however, the chief interest of the Conference lies in the list of legislative reforms which are desired by the International Council of Women. There was keen discussion on the question of the international interchange of teachers, such teachers to be safeguarded in their pension rights while serving temporarily in countries other than

their own. The resolution was eventually adopted, the dissentients being concerned chiefly with its alleged impracticability. There was absolute equanimity on the questions of woman's suffrage and the equal moral standard, including the abolition of every form of state regulation of vice. Women from States in practically every stage of civilisation are working for these reforms, and are helping each other by international organisation in propaganda, exchange of experience and voluntary work to overcome the different forms of opposition met with in the different countries.

Wife and Child.—Another series of resolutions dealt with the economic and legal position of the wife and child, although the position varies considerably in different countries. The recommendation was carried that a wife should be "legally entitled to a certain just proportion of her husband's income." Here the advanced experience of the Scandinavian countries was undoubtedly helpful. After joint Conference, legislation is in process of enactment in Denmark, Norway and Sweden, based on recognition of the equality of husband and wife, and the economic significance of their common life. This will provide for independent ownership of individual property, while stipulating that each should have certain rights over the property of the other which must be taken into account in the management of such property. Thus, in these countries, it will be impossible to sell or mortgage dwelling, business premises, tools, furniture or children's property without the consent of the other partner. (Many social workers would welcome a law which made it impossible for a thirsty husband to pawn the mangle or the sewing-machine, or his prosecution for the wanton destruction of furniture which often occurs during a fit of drunkenness!) The same legislation is providing for individual responsibility for individual debts, although admitting that payment for necessary household purchases made by the wife should be recoverable from the husband. Another provision which runs contrary to recent English legislation is that husband or wife working in the business of the other shall have the right to a just wage, but a retrospective claim must be preferred within one year.

Endowment of Motherhood.—The much-discussed question of the Endowment of Motherhood met with the mixed reception that one would have expected and suffered more than less contentious subjects from the crowded programme, complicated by the fact that the delegations, although possessed of only one vote, if a vote had to be taken, were nevertheless at perfect liberty to speak with as many voices as a delegation had members. The principle has been adopted in different forms in several countries, and it is significant that the strongest support came from these countries. One felt, however, that the discussion was somewhat one-sided, and that it would have gained in weight if National Councils of Men had been represented to give their considered opinion on the functions and powers of fatherhood. Finally, the Council agreed to support "the principle of the endowment of women in necessitous cir-

cumstances," adding that "Mothers who have their children with them ought to be secured a fixed minimum income in proportion to the number of their children." Thus support was given to the opinions expressed by social workers who are continually face to face with the difficulties caused by the failure or inability of fathers to support their families, and who are naturally sensitive to the almost superhuman burden at present thrown upon the womanhood of the civilised world, alike by defects of social organisation, the failure of a large number of individuals adequately to perform their paternal duties, and the absence of adequate alternative proposals from Parliaments.

Equally contentious was the subject of the rights of children born out of wedlock—a burning question that is handled very diversely in different countries. Eventually the Council determined to advocate changes that would give the child the right to bear the paternal name and to secure adequate maintenance from paternal resources.

Nationality of Married Women.—The discussion on the right of a married woman to choose her own nationality was blurred by the fact that the delegates from some of the less cosmopolitan countries failed to realise that they were considering a permanent difficulty and not one arising solely in time of war, although at such a time it must be considerably accentuated in all its bearings. The obvious plea that a woman ought to adopt the nationality of the country in which she makes her home and have the protection of its laws also obscured the main difficulty, *i.e.* the case of a woman who marries an unnaturalised alien living in her own country. It is very clear that any solution that can be adopted is open to certain objections. One of the several women-lawyers present argued the difficulty of co-ordinating the English and Continental systems of civil law, but the plea of some of the British speakers that we should not wait for a perfect and co-ordinated international solution, but start reform in spite of difficulty, was supported by the representative from Uruguay, coming as she did from a group of States where a woman making an alien marriage does not as a rule lose her own nationality. Time did not permit of a close enquiry into the working of this system, but the Council finally passed three resolutions on the subject, which may probably be the prelude to an almost world-wide agitation for change.

In the first instance affiliated national councils are recommended "to promote legislation in their respective countries, which shall give women the right to retain their own nationality on marriage with a subject of another country, and shall allow to a woman the same choice of nationality as to a man." In addition, the subject was referred to the standing Committee on Law, and to the constituent national councils for further study, as a prelude to formulating proposals, nationally and internationally for international agreement on this vexed question, proposals which will be eventually presented to the several governments and to the League of Nations.

Economy.—When the Council finally came to the resolution advocating a return to a simpler mode of life it was evident that the assembled women realised that law does not reign supreme in all spheres of human activity, and that some objects can best be pursued apart from its aid! Sumptuary laws are not renowned for successful working, so the affiliated councils are recommended "to use their influence to bring about a return to a simpler mode of life, and to combat, in the home as well as in society, luxurious habits which lead to extravagance and display in dress and amusements, and which, in the opinion of the International Council of Women, contribute largely to arouse class animosity and discontent, which are amongst the worst evils of our day."

It remains to be seen what action the affiliated councils will take on this as on other subjects of debate. Women have now the right to vote in nearly thirty countries, they sit in Parliament and can, in many places, enter the legal profession. Lawyers were a small minority in the meetings, but the members as a whole showed keen appreciation of the legal position in regard to most of the points raised, and considerable knowledge of the laws of their own and often of other countries. It is significant that members absolutely refused to participate in any action that could be construed as a pretext for starting a women's section of the League of Nations itself. They have no intention of abandoning the organisation that they have perfected during the last twenty-five years, but they stand firmly by their claim to partake on equal terms with men both in the world organisation and in their several countries where they have helped or are helping each other to gain the rights of citizenship.

THE CONSTITUTION OF CZECHO-SLOVAKIA.[1]

[*Contributed by* DR. VLADIMIR DEDEK.]

CZECHO-SLOVAKIA, as it emerged from the Great War, covers, with slight modifications, the territory of the ancient kingdom of Bohemia, with the lands Moravia, Silesia and Slovakia. Slovakia has returned to her mother-land after a separation of more than one thousand years.

By the note which the Austro-Hungarian Minister of Foreign Affairs, Count Andrassy, addressed to President Wilson on October 28, 1918, Austria-Hungary recognised the independence of the Czecho-Slovak nation. On the same day the independence was proclaimed by the National Committee in Prague. The Committee, which had been in existence for some time, was composed of the most prominent political leaders of the nation in the Viennese Parliament. This proclamation is the first constitutional law of free Czecho-Slovakia. It says nothing about the form of the new State, and confines itself to the maintenance of existing laws and decrees.

[1] A complete English translation of the Constitution was published in *The Contemporary Review*, September, October and November, 1920.

By order of the same National Committee in which the supreme authority was vested, the Provisional Constitution was promulgated as the law of November 13, 1918, No. 37 of the Statute-book. This short law, containing twenty-one paragraphs, provided for the enlargement of the National Committee, which was now to have 256 members co-opted in proportion to the strength of existing political parties from among notable men and women of the nation. This body, in which the revolutionary National Committee was dissolved, was called the National Assembly, and many a popular writer and many a scholar, unknown to the public, were among its members. Its task was legislation and the control of the executive (para. 4). It was also understood, though not expressly stated, that the National Assembly would draft the Constitution. The head of the State was a President elected by the National Assembly, with the right of legislative veto, and with powers limitatively enumerated in para. 10. The executive was committed to a Government of seventeen members (ministers), elected by and responsible to the National Assembly for the acts of the President.

This was a Cabinet-system of government. The same constitutional idea forms the foundation of the Definitive Constitution.

My intention is to write a short description of its main and characteristic provisions for the information of the English reader. I shall therefore abstain from discussing such provisions that are common to all constitutions of civilised nations, *e.g.* those guaranteeing personal freedom, the protection of private property, etc.

The actual Constitution of Czecho-Slovakia comprises a series of laws enacted in the solemn and last session of the First National Assembly on February 29, 1920, and other additional laws voted by the Second National Assembly. Some of the Constitutional laws, provided by the Constitution, have yet to be passed, *e.g.* that concerning the election of the President.

The foundation-stone of the whole Constitution is the Constitutional Charter law of February 29, 1920, No. 121 of the Statute-book. It provides that all acts and laws contrary to the provisions of the Constitution are to be void, etc.

Some of the provisions of the Charter were the subject of dispute, especially the separation of the Church from the State and the meaning of "langue officielle" of the St. Germain peace treaty. But finally a compromise was reached.

To express this spirit of union a preamble was moved by a member, Dr. Herben, a friend of Masaryk's, and was unanimously adopted to introduce the Constitutional Charter.

The National Assembly, having the choice between a *rigid* and a flexible system of Constitution, adopted the *first* because of the very bad experiences under the Hapsburg rule, when the Constitution was often and arbitrarily changed, and so had no opportunity to become established in the respect of the people.

The electoral law is a part of the Constitution, and may be changed only by a qualified majority (three-fifths of both chambers, according to s. 33 of the Charter).

The system of two chambers was, after strong opposition by the Social Democratic Party, adopted to have, as Maine expresses it, "not a rival infallibility," but an "additional security." The Government Bill provided for a *successive* change of the Senate every fourth year—one half to be changed—and for a considerably higher age qualification for voting for the Senate (giving electoral franchise for the Senate), namely, thirty years; but the Social Democrats succeeded in obtaining a Senate without successive change, and in lowering the age required for Senate-franchise to twenty-six years.

Now there is a fear that both Houses are too little differentiated, and that this will make the advantages expected from a bicameral system illusive.

The political supremacy of the Lower House is sufficiently established by ss. 43, 44 (divergences between the two Houses about a bill), s. 41 (government financial bills and bills relating to military service must be introduced first in the Lower House), and s. 78 (vote of confidence, resignation of the Cabinet).

The Legislature is safeguarded against the Executive by s. 54 (a committee "composed by one-third of the members of Senate" and by two-thirds of the members of the Lower House), sitting all the time, when the Houses are not assembled, controlling the Cabinet and legislating "under precautions and restriction" of para. 8 *a–d*.

As to the President, his rights, which are many and efficient, are derived powers. The powers of the National Assembly (House of Representatives and Senate) are original. The President has only such powers which are given him expressly by the Constitution. His powers are, besides, all purely personal and cannot be transferred.

The *collective* responsibility of the Cabinet has been adopted as in Great Britain; and, following the example of the United States Supreme Court, there is created a Constitutional Court.

The only source of supreme power in the State is the people. The Czecho-Slovak State is a democratic Republic with an elected President at its head. The Carpathian Russia, enjoying Home Rule, is an inseparable part of the State territory.

The Legislature has two chambers: the House of Representatives with 300 members, and the Senate with 150 members. Both are elected by a universal, equal for both sexes, direct and secret suffrage according to the principles of proportional representation.[1]

The minimum age prescribed for the House of Representatives electors is twenty-one, the minimum age of its members is thirty years. For the Senate: electors twenty-six, members forty-five years. The term of office for the lower chamber is six years, for the Senate eight years. The

[1] The polling-day is, as expressly stated in the Charter, exclusively Sunday.

validity of the votes returned is examined by a special Electoral Court. The rules of incompatibility and immunity are imitated from other constitutions. The members of both chambers have a monthly salary.

The President is bound to summon both chambers to two regular sessions every year. The spring session must begin in March, the autumn session in October. The President is bound to summon both chambers whenever a majority of all members of one of the Houses desires it, and to announce the subject for discussion. If the President of the Republic does not summon them in fourteen days, they meet after another fourteen days have elapsed, upon being summoned by their respective Presidents.

The sessions of both Houses begin and end simultaneously. The President has the right to adjourn them for not more than one month, and only once during a year. He has the power to dissolve both Houses, but cannot do so during the last six months of his office.

For ordinary business one-third of the members of each House must be present, and a simple majority of votes is sufficient. To vote for the declaration of war or to amend the Constitution a majority of three-fifths of all the members of each House is required. Each House has the authority to provide its own rules of procedure. When both Houses unite themselves in one common session as a National Assembly, to elect the President, the rules of the House of Representatives are made use of, and the President of the House presides. The ministers have the right to be present in both Houses, and all committees, and may address them whenever they like. They are bound to appear in person whenever desired by either House or by any committee.

The legislative initiative belongs both to the Government and to either of the Houses. Every project of a law presented by a member of either chamber must be accompanied by an estimate as to the financial bearing of the project and by a proposition how to meet the expenditure involved.

The Government's proposals relating to the Budget and military service must be presented first to the House of Representatives. The Senate is bound to pass its resolution on these two kinds of bills in one month, and on any other Bill, voted in the House, in six weeks. If the Senate does not pass its resolution in due time, its tacit consent is presumed. If the Senate rejects a Bill accepted by the House, the Bill, nevertheless, passes into law, when the House adheres by a simple majority to its original resolution. If the Senate rejects by a three-fourths majority a Bill accepted in the House, a respective vote of three-fifths of the House is necessary. If, on the contrary, the House rejects a Bill presented first to and voted by the Senate—which cannot be any Bill relating to Budget and military service—and the Senate declares its adherence still to its original resolution, this Bill is nevertheless defeated when the House rejects it for the second time. A simple majority in the House is sufficient, even if the resolution of the Senate is unanimous. This power of the Lower House does not apply to the constitutional laws to which both chambers must

agree (paras. 42–44 of the Charter). If the National Assembly rejects a Government's proposal, the Government can, by a resolution which must be unanimous, submit it to a referendum. In this case everybody is entitled to vote who has the suffrage for the House of Representatives. An initiative referendum, such as in Switzerland, is unknown to the Constitution of this country.

The President of the Republic, who sanctions the laws, has the right to return any Bill with remarks to the National Assembly (the collective denomination of both chambers) within one month after the Bill was presented by the Assembly to the Government. If both Houses by simple majorities declare their adherence to the Bill, or if in case of dissent between both chambers the House of Representatives confirms it by three-fifths of its members, the Bill passes into law. (Par. 48.)

Whenever the National Assembly is not sitting (*e.g.* in case of a dissolution, adjournment, etc.) a Permanent Committee composed of sixteen members of the House of Representatives, and of eight members of the Senate, is in office to make necessary provisions having the force of a law and to control the Executive.

The Permanent Committee cannot elect the President, cannot by its provisions change the constitutional laws, nor impose a lasting financial burden, enlarge the military obligation or alienate the State property.

If by a provision a matter is regulated, that otherwise is regulated by a law, the sanction of the President is indispensable. Provisions replacing a law can be nullified, just as any law by the Constitutional Courts. (Para. 54.)

The President of the Republic is elected by the National Assembly. Anybody, man or woman, eligible for the House of Representatives, and having reached the age of thirty-five years, can be elected President by a majority of three-fifths of the National Assembly, *i.e.* the House of Representatives and the Senate sitting as one body. His term of office is seven years. He is re-eligible only for two successive terms and can be elected for the third time only when since the end of his second term seven years have elapsed.

His rights, as enumerated in para. 64, are the following: (1) He represents the State in foreign relations, negotiates and ratifies international treaties, etc.; (2) receives and accredits ambassadors; (3) proclaims martial law, declares, with the previous consent of the National Assembly, war, and submits to it the peace which he has negotiated; (4) summons, adjourns and dissolves the National Assembly; (5) returns, adding his remarks, Bills voted by the National Assembly, sanctions by his signature Bills of the National Assembly and of the Diet of Carpathian Russia and the Provisions of the Permanent Committee; (6) reports to the National Assembly orally or in writing on the situation of the Republic, and recommends to its deliberation such measures which he thinks necessary and useful; (7) nominates and dismisses the ministers and fixes their number; (8) nominates all professors of high schools, without

difference of rank, and judges, civil servants, and officers of higher ranks; (9) makes on the proposition of the Government charitable gifts; (10) is the supreme commander of the defensive forces; (11) has the right to grant pardons. All governmental and executive powers not explicitly given to the President are vested in the Government, *i.e.* collective denomination of the ministers—as the French Conseil des ministres.

The responsibility for the acts of the President rests wholly on the shoulders of the Government, the President being only subject to impeachment. The only crime of which the President can be thus accused is high treason, the only punishment is the loss of office and re-eligibility. (Para. 66–67.) The impeachment is voted by the House of Representatives, the Senate sitting as a Court, just as in the United States, whose constitution was here followed.

The Government (the ministers) are jointly and severally responsible to the House of Representatives, not to the Senate (para. 75). Here again the French practice, though not the letter of the French Constitution, served as the model. The ministers are subject to impeachment when they violate in the exercise of their office on purpose, or by culpable neglect, a constitutional or other law (para. 79).

For the purpose of elections into the House of Representatives, the territory of the Republic is divided into twenty-three districts, and for the purpose of the Senate elections into thirteen districts. The size of the districts and the number of seats allotted to them vary, the biggest and most richly endowed being the district of the metropolis, Prague, reaching as far south as to the old Hussitic town Tábor and as far east as to the town Čáslay, where the body of the great Hussitic warrior, John Zizka, is resting in the grave. In every community permanent registers of electors are kept and completed every year of all subjects of both sexes, who have reached the age of twenty-one, who have resided in the community for at least three months and are not deprived of the franchise by law. Soldiers are given the franchise, being registered in their garrisons. The law excludes only persons deprived by a decree of a court of the free disposal of property (lunatics, etc.), bankrupts, or persons condemned to forced labour for an offence committed from dishonest motives, *e.g.* usury law of December 19, 1919, No. 663 Statute-book. These matters are dealt with by very detailed rules (laws of February 29, 1910, No. 123 and 125 Statute-book).

The suffrage, which is general, secret, direct and proportional, is also a general civic duty, which must be exercised personally, voting by proxy not being permitted. From this duty are exempt persons over 70 years of age, persons incapable, in consequence of a disease or defect, of going to the polling-place, persons who are on the day of election more than 100 kilometres from the polling-place, or who are prevented by *vis major*. (Para. 6 of the Electoral Law, No. 123 of the Statute-book.)

The election day is to be a Sunday (paras. 8 and 13 of the Charter) chosen by the Ministry of the Interior (para. 15, Elect. Law, No. 123).

On the twenty-first day, at the latest, before the day of election each political party is to submit to the chairman of the electoral commission of the district a list of its candidates. Nobody can be candidate for more than one party and for more than one district. The expenses of the printing are borne till the end of the year 1924 by the Government and the respective parties in the proportion of two to one. Beginning with the year 1925 they will be divided equally. (Para. 29.)

On the day of election and the day before, the sale of and retail of spirits is prohibited (para. 32).

At the latest on the third day before the day of election the lists of candidates of all parties going to the poll in the district are delivered by direction of the mayor of the community to the electors in their homes. These lists are voting-papers. The strict *scrutin de liste*, lately introduced in France, is accepted; the elector must choose one single list, which he puts into the ballot-box. He may not strike off the list he has chosen one single name, nor may he change the strict sequence of the candidates. A list altered in any such way is null. If in a voter's envelope two or more lists are found, all are null. (Para. 38, Elect. Law.)

There are three scrutinies. The first is done by the district commission. The total of all valid votes, given in the district, divided by the number of seats to which the district is entitled, gives the electoral quotient. Each party gets in the first scrutiny as many seats as many times the quotient is included in the total of votes given in the district to that party (para. 46). If a party has nominated less candidates than it is entitled to by the number of votes given to it, it gets only as many seats as there were candidates nominated, and is not admitted to the second scrutiny with the remaining votes given to it in that district (paras. 47 and 51). On the eighth day after the election has ended in the whole Republic the second scrutiny takes place before the Central Electoral Commission established at the Ministry of the Interior in Prague. To the second scrutiny are admitted parties who secured in one district at least 20,000 votes. Parties admitted to the second scrutiny present to the chairman of the central electoral commission, lists of their candidates nominated already in some district for the first scrutiny and not elected. To introduce new candidates is not permitted. The order in which each party arranges its candidates not yet elected in this list is left to the discretion of the parties themselves. (Para. 48.)

The Commission ascertains the total of all surplus votes to which the admitted parties are entitled. The total, divided by the total of the remaining seats, plus one, gives the quotient for the second scrutiny.

If by this method one candidate is elected in excess of the number of seats available the necessary reduction is made at the expense of that party whose remainder in the division described above is the smallest, or, when two parties have the same remainder, whichever received less votes in the election. If even this total should be the same for two parties, the result is decided by lot. (Para. 52.)

If by this method all available seats are not yet allotted a third scrutiny takes place. It is done by the same Central Electoral Commission, which assigns the remaining seats successively to those parties whose remainders in the division made in the second scrutiny are the greatest. In the last resort the result is decided by lot. (Para. 53.)

The freedom and purity of elections is guaranteed by detailed regulations (chapter vi. of the Electoral Law, No. 123 Statute-book) common to the constitutions of civilised nations. In this point, apparently, the influence of the Constitution of Austria-Hungary was great.

The validity of all votes returned either for the House of Representatives, the Senate, or the local government bodies, is examined by the Electoral Court, which passes judgment upon complaints in electoral matters and declares eventually the forfeiture of a seat. Its ten members are elected by the House of Representatives from among persons learned in law and not members of the National Assembly.

The procedure before this tribunal, equal in dignity to the Supreme Court of Justice, the Supreme Administrative Court and the Constitutional Court, is regulated by the law of February 29, 1920, No. 125 Statute-book.

Terminating this brief and deficient survey of the first free Constitution of Czecho-Slovakia since the year 1517, it will not perhaps be out of place to recommend to readers who are interested in its constitutional history and tragic fate, Count Lützow's *History of Bohemia* and the admirable books of Ernest Denis, *La fin de l'indépendance tchèque*, from the end of the Hussitic wars and the accession of King George to the battle on the White Hill, 1620; and *La Bohême après la Montagne Blanche*, from 1620 to the Renaissance of the Nation in the 19th and 20th centuries.

NOTES ON INTERNATIONAL LAW.

Public Policy in International Law.—The article on this subject in the *Yale Law Journal* (vol. xxix. No. 7), by Professor J. Koster, of the Supreme Court of Judicature of the Netherlands, is an interesting analysis of the principle which is variously described as " public order " or " public policy " or the prevailing *mores* of a State, and substantially means the rules of the national law or morality to which any Court must have regard in trying any question raising international considerations. The academical and judicial position of the author, and his careful presentation of the different considerations to be taken into account on this subject, render his study a valuable contribution to the better understanding of the relative position of national law and foreign law. Adopting the standpoint of positive law for his conception of private international law, and rejecting the theory that it is based on the law of nations, he premises that every State, by virtue of its sovereignty unfettered by international agreement, in the sphere of private legislative jurisprudence, has the right to apply to international questions either (*a*) the rules which it applies itself to national questions, or (*b*) the foreign law connected with the subject in hand, or (*c*) independent rules of its own making; and its motive will but rarely be comity in its literal sense, but rather the outcome of its own investigation into such questions resulting in the application of what it deems to be the fittest law. The only exceptions (apart from treaty), he admits, are such general rules as: (1) that a State cannot apply to all private international questions its own national code regardless of the circumstances; and (2) that a State cannot refuse to foreigners the protection of its laws and rights to trade because they are foreigners, or such protection against its own subjects. He examines the position of the doctrine of public policy in the various schools of thought, *e.g.* his own view, which follows that of the older Dutch jurists, the Anglo-American law and the Continental codes, and also the view of Savigny, which recognised rights and obligations between States in the sphere of Private International law, and that of the Latin school, which made nationality the criterion of such rights subject to the right of self-determination of the parties and the sovereignty of the State; but, in effect, all substantially agree in requiring the foreign law to give way to the law of the *forum* when the latter's public policy, order or morals require it. It has first to be ascertained what those rules are, and next what rules from a general point of view are the best for private international intercourse. The other schools of thought above men-

tioned require this to be considered, not from the view of one State, but from a wider standpoint. The author appears to agree that, in questions connected with more than one State, public policy must be regarded from the international as well as the national point of view, though the question cannot always be solved uniformly by mutual accommodation between the States concerned. His conclusion is that the public policy of the State is involved in every rule for collision between the laws of different States by which the foreign law is excluded for the benefit of the national law, and in every such case there is, at bottom, a conflict of public policy between them. There are various degrees of application of the home law of the State in such collisions. It may be territorial or extra-territorial, or partly both, according to the locality of the act in question and whether the parties to it are subjects or foreigners. It is impossible to enumerate the legal rules of public policy, and difficult to classify them; as their basis may be legal or moral or connected with political, economic, religious or ethical considerations; they cover a wider field than public law; what is public policy in one State is not in another; and a rule of public policy may not always retain that character, *e.g.* the usury laws. The principle affects both acts of persons which are originally international, and also those which are originally national in character, and its application depends on the closeness of the connection between the question under consideration and the State of the judge. In most cases the best solution—and the general practice—is to apply the law of one or the other State involved, but in other cases this is not so, viz. (*a*) when public policy does not require the *lex fori* to be exclusively applied, but is satisfied if it is applied in a lesser degree than it would be in the national sphere of that law; (*b*) where public policy requires the *lex fori* to be applied, but such application in the particular case would lead to hardship; (*c*) where an act valid by the *lex loci* is undertaken in order to circumvent the law of another State, *i.e. in fraudem legis*, which will damage a third party and relief is properly claimed against it. In all these cases there is occasion for the judge to apply an independent rule of private international law. Special consideration is due to the case of contracts, because regard must be had to the right of the parties to determine their mutual relations. A subjective standard is applicable in cases where the parties have expressed their intention as to what law shall govern, or such an intention, though not expressed, is to be inferred from the circumstances of the case. An objective standard is applicable, if there is no expression or implication of the parties' intention, viz. the intention of reasonable normal persons in the circumstances of that international relation. If the former standard is applicable, the will of the parties should be allowed to govern it everywhere as far as the public policy of the *lex fori* does not exclude it; if this latter nullifies it, the act should be regarded as null everywhere. If the latter standard is to be applied, the law must be preferred with which the agreement is most closely connected, *e.g.* the *lex loci contractus*; but

if this last law makes it void, the author is of opinion that it should prevail, even against the assumed normal intention of the parties to refer the matter to another law connected with it by which it would be valid. The last question examined by the author is how far the judge shall take account of the rules of public policy in a foreign State. If, according to the rules of collision prevailing in the judge's country the foreign law governs, then he holds that its public policy should be given full scope, so far as it does not conflict with the public policy of the *forum*. If, on the other hand, according to those rules the national law governs, then the foreign law's public policy should be given effect to, unless the act is opposed to the morality of the foreign State and would injure its social and political interests, in which case the act should be regarded also as immoral in the judge's State. The right of a *bona fide* third party in these cases should be determined by the *lex fori*. Lastly, if the public policy of the judge's State is not infringed, but the laws of two foreign States involved in the question are mutually incompatible, is he to give effect to the foreign law which his own law designates as the proper one to apply, or is he to take into account the public policy of both foreign States? The author refers this question to the standard of public order in the judge's country, although its public policy does not apply, for this results in the application of the foreign law of which the public policy agrees with that of his own law, and enables due regard to be paid to the other personal interests depending on the validity of the act.

The foregoing summary will perhaps serve to show the general argument of the essay. The author admits that his main conclusions differ from the general conception of the part played by public policy in private international law. It may be added that the suggestion that a judge has a free hand to make his own arbitrary rules for a conflict of laws is equally novel.

The author's propositions are, however, worthy of serious consideration; and it is a real service to the study of the subject to have a practical exposition of the meanings of such terms as the *lex fori*, the *lex loci actus*, etc., when they have to be applied to concrete instances.

The Theory of Qualifications and the Conflict of Laws.—An equally interesting study of another problem in the rules of the conflict of laws is afforded by an article by Professor Ernest G. Lorenzen, of Yale University Law School, in the *Columbia Law Review*, vol. xx. No. 3, dealing with the question what law is to decide the meaning in which the "concepts" or terms of private international law are used and generally known to Continental writers as the theory of "qualifications." After considering the views of Continental authors on the principal questions involving the solution of a conflict of law, such as domicil, nationality, law of the place of contracting, and law of the place of performance of contracts, the law of the place where a tort is committed, the nature of property, whether movable or immovable; whether a

rule is one of substance or procedure, or of capacity or form, the differentiation of rights according to whether they belong to the law of succession or the law of matrimonial property, and of acts according to their " civil " or " commercial " character, he considers the theories variously advanced for the general problem. There is Bartin's theory that it is for the *lex fori* to decide the nature of the particular juridical relationship on which depends the application of the *lex fori*, or the law of any other country, even in cases where that relationship as such had originally no connection with the *lex fori*, and it is differently " qualified " or interpreted by the law of that other country with which it is connected ; except that the *lex situs* for practical reasons, should determine the nature of property and that in contracts made by correspondence the *lex loci contractus* should be that which postpones its formation longest. Other foreign jurists—Buzzatti, Diena, Kahn—substantially take the same view. On the other hand, Despagnet advocates the claims of the law governing the legal relationship to control also its qualification ; Gemma would make decisive the standard, not of any municipal law, but of the requirements of international life and order, so as to build up a real system of private international law ; and Jitta, on similar grounds, rejects the mechanical application of any of the particular laws to which conflicts are usually referred, in favour of the law required by international social life in the particular case.

The author regards the general attitude of the English and American Courts and writers, as clear, and certain questions as being decided by authority. For example, the nature of property is determined by the *lex situs* ; domicil has been decided in English Courts by their own law either directly or by reference back to it from the foreign law which they have regarded as properly applicable to the case. The author does not consider such a case as *In re Johnson* as authority for the proposition that a domicil cannot be established in a country without complying with the rules of that State relating to domicil. He is of opinion that the United States Courts determine the question of domicil by the " general " or international law incorporated into the *lex fori*, and not by reference to any foreign law. In the absence of decisions he holds that questions involving the *lex loci contractus* or of capacity or form are decided by the *lex fori* ; and, following such decisions as *Ogden* v. *Ogden*, he concludes that the " qualification " of legal transactions and the definitions of domicil, *lex loci contractus*, and other points of contact, are generally governed by the strictly internal law of the *forum*—which is, moreover, the only result consistent with the Anglo-American theory of the conflict of law, and agrees with Bartin's theory. This is due to the " nationalist " theory of private international law, as opposed to the Continental standpoint of internationality which Despagnet and Gemma represent. Professor Lorenzen proceeds on the same lines as Professor Koster, in his article with regard to " public policy " in international law," in adopting the former principle, and describing the latter as " idealistic " and lacking

in a foundation of positive law, but with the reservation that the " nationalist " theory, stated in its absolute and unqualified form of the complete independence of every State in the matter, is open to the objection that the application of the *lex fori* in all cases would be a breach of the " well established rule of international law forbidding a fundamental denial of justice to aliens," and that " no State is authorised, at the present development of international relations, to exclude the application of foreign law altogether, or to act arbitrarily in the application of its rules of the conflict of laws." Examining the relation of the Anglo-American theory to the present problem, he assumes the doctrine of the territoriality of law and comity of nations as the basis of the theory, and the notion of " law " as resting on the existence of physical force on the part of organised society. He leaves it to the discretion of the *forum* whether to apply the foreign law or not, as upholding the absolute right of the Court of a sovereign State to attach any legal consequences to any state of facts, including acts done in a foreign country, even if this be in contravention of international law. Though it would be highly inconvenient as well as unjust for the *forum* to exercise that power in every instance—and in the interest of a proper administration of justice, a State will often attach to operative facts occurring in a foreign State the same consequences as the law of that State would attach to them—the foreign law is not imposed on the *forum* from without, as would be consistent with this " internationalist " theory (but not with the Anglo-Saxon conception), and the *forum* acts perfectly independently in accordance with its own notions of what is right and proper. His conclusion is, therefore, that the *lex fori* shall determine the legal concepts for itself, subject to the reservation (for convenience) of : (1) applying the *lex situs* for classifying property as movable and immovable ; and (2) the acceptance of the qualification of the legal transaction which is common to two foreign States when the law of one of them is applicable by the *lex fori*.

The American Bar Association on the League of Nations.—The Journal of the American Bar Association for April 1920 contained, among other things, the report of a special Committee of the Association on the League of Nations. The Committee consisted of Judge William H. Wadhams and Messrs. Frederick N. Judson, Edgar A. Bancroft, Henry St. George Tucker, and Charles Blood Smith. The report is signed by the first three, as a majority ; Messrs. Tucker and Smith add a note that they do not concur in the report.

The report gives an analysis of the Covenant and of those provisions of the Treaty of Peace with Germany that refer to the League of Nations ; and the final opinion expressed by the majority is that the Treaty of Peace, including the proposals for a League of Nations, should be ratified by the United States without amendment. They point out certain respects in which they consider amendment desirable, but they do not consider these of sufficient importance to warrant the rejection of the

Treaty, or the delay and risk involved in its resubmission to the Peace Conference. If amendments are proposed by the United States, they say, other Governments would undoubtedly propose amendments, and it is unlikely that a second conference could produce a more satisfactory treaty. They call attention to the fact that arguments similar to those advanced against the League were presented against the adoption of the constitution of the United States, and it required amendment to perfect the Union. The constitution was ratified, although not altogether satisfactory to all the States, and ten amendments were proposed at the first session of the first Congress of the United States. The Covenant of the League will from time to time require amendment, and only through experience of its actual operation will it be possible to perfect it. The course the majority recommend is that, after unqualified ratification, notice should be served by the United States on the other members of the League requiring amendment of the Covenant in certain respects under Article 26. As they aptly point out, such procedure would require only the concurrence of the nine members composing the Council and a majority of the members constituting the Assembly, whereas amendment at the Peace Conference requires unanimous action. They do not favour any reservations on ratification, because these could not operate without the consent of all the other signatories to the Treaty, unless they were purely interpretative and not amending; and interpretative reservations would have no binding effect on the League, and merely place on record an expression of the views of the United States Government.

The report expresses the opinion that it is a matter of regret that no specific provision has been made in the Covenant for the calling of international conferences to formulate and codify, and from time to time amend international law. There is nothing, however, it points out, in the Covenant to prevent further development of international law through the ratification by the several members of the League of proposed legislation framed either by the Assembly of the League or by special conferences called either by the Council or by the Assembly for that purpose.

The report lays especially strong emphasis on the unanimity required among the members of either the Council or the Assembly as a condition of the taking of important action by those bodies. As a permanent place on each of those bodies is given to the United States, it is contended that they will run little risk in joining the League, since they can veto any important action proposed. The report does not appear to attach quite sufficient weight to the exception from the principle of unanimity involved in the exclusion of the parties to a dispute from the category of members whose unanimous approval is required for making effective a recommendation of the Council or Assembly under Article 15 with reference to a dispute, nor to the further exception made under the same article in the case of the reference of a dispute to the Assembly, the approval of a majority of those members not represented on the Council being

sufficient in that case to render a recommendation effective provided that it is unanimously approved by the members represented on the Council (parties to the dispute being in each case excluded). Recent events in the United States have diminished the value of the report, but it contains suggestions which may be utilised as amending the League.

The report opens with a statement which, though unimportant, is in fact erroneous. It says that " the first active organisation looking toward a League of Nations was formed on June 17, 1915, in Independence Hall, Philadelphia, under the name of 'League to Enforce Peace.' " An organisation which did at least as effective work as any other in the promotion of the movement for the League of Nations was the British League of Nations Society (afterwards merged into the League of Nations Union), and this was formed more than a month earlier at a meeting in Westminster. The Dutch and Swiss Societies were also early in the field.

An American Idea of a League of Nations.—The April 1920 number of the *Advocate of Peace* (American Peace Society), contains a leading editorial article, and also a special article by Mr. James L. Tryon, Ph.D. (entitled " An American Idea of a League of Nations "), in both of which the main idea expressed is one of regret that the form of international organisation adopted in the League of Nations Covenant has not been one involving direct continuity with the Hague Conference ; that the Covenant has not brought about more of a judicial union and less of a political and executive union ; that it has not sought to work more by means of the agreed formulation of international laws and by arbitration ; and that it has not followed the Hague rule of admitting all nations to membership at the outset. It appears to be thought that if the United States finally decides not to ratify the Covenant and the Peace Treaty, a way out of the difficulties arising from this decision may be found in the assembling of a conference of all nations.

A Summary of Plans for International Leagues.—*Synopsis of Plans for International Organisation* (American Peace Society, Washington), is a classified summary prepared by Mr. Charles H. Levermore, Secretary of the New York Peace Society, of the recommendations contained in numerous plans and proposals for the systematic regulation of international relations which have been put forward at different times from various sources. The summary deals with the ideas of persons as far back as Dante, William of Ciervia, and George Podiebrad, King of Bohemia, and comes down through William Penn, Rousseau, Kant, the British League of Nations' Society, etc., to the Covenant of the League of Nations adopted by the Paris Peace Conference on April 28, 1919.

The summary attempts to classify the contents under eight different headings, but the classification is necessarily very rough and incomplete. It gives, however, a useful comparison between the various schemes and a good bird's-eye view of the history and evolution of the ideas of international organisation.

International Law Pamphlets.—From M. Édouard Clunet we have received a collection of reprints of interesting papers which he contributed to the French daily press and legal journals on various legal topics during the war. Notable in a series of opinions distinguished alike for clarity and conciseness of statement and command of apposite principle and authority, is his paper on " De l'état d'omission pour un naturalisé français au point de vue de service militaire " (reprinted from *Clunet*, 1916, p. 10, 25). In another contribution he deals with the arrest of the enemy consuls at Salonika in 1917, and, by the judicious addition of evidence taken from the subsequent newspaper reports, he shows how well justified this step was in fact as well as in law. Of present topical interest are his summaries of the treatment of enemy property rights and interests in France and enemy countries during the war. In contradistinction to the policy of our " Trading with the Enemy Acts," France merely placed such property under sequestration, in virtue of her pre-war civil law, the owner being incapable of administering it—in consequence of the war. Liquidation was authorised by the Courts only in exceptional cases, and did not become general until after January 10, 1920, as authorised by Art. 297 (*b*) of the Treaty of Versailles. Such property now, of course, forms part of " the economic hostage " for due payment by Germany of enemy debts.

War as an Instance of Force Majeure.—The effect of war on contracts is a topic which has attracted much attention from jurists in all the belligerent countries of Europe. Professor Mario Ricca-Barberis deals with one aspect of the question in an able and carefully reasoned pamphlet which discusses the limits to be assigned to state interference with contractual rights during war time.[1] In Italy, as well as in England, legislation has been found necessary to adjust the rights and liabilities of contracting parties in the case of serious hardship brought about by war conditions. In both instances the same difficulty has arisen; namely, that the Legislature has refrained from laying down any principles according to which relief may be granted, with the result—as has been pointed out by Rowlatt J.—that the judge is placed in the position of a dictator in each individual case.[2] Professor Ricca-Barberis discusses the tendencies of the Italian Emergency Legislation, and lays down the principle that the tribunal called upon to grant the relief should be guided by the maxim " salus populi suprema lex," rather than by the consideration of the hardships which may be undergone by the contracting parties. He inclines to the view that the question should in each case be whether the contract should as a whole, stand or be dissolved from the point of view of the exigencies of national defence, and that the tribunal should refrain from attempting merely to adjust the contractual relationship of the parties so as to minimise the hardship to individuals. This is an

[1] Sulla guerr a come caso di forza maggiore: Mario Ricca-Barberis (*Rivista di Diritto Civile*, No. 3, 1917).

[2] *Wauters* v. *Associated Internationale d'Agencies, Ltd.*, 1918, W. N., 627.

interesting point of view, and there is much to be said in its favour. Mr. McNair reaches very much the same conclusion as regards the inadvisability of legislative interference by a readjustment of contractual rights, though he bases his view on the adequacy of the common law to deal with the matter without assistance from other quarters.[1] The danger is, of course, that if the Courts are deprived of a discretionary power to mitigate hardships, they may be tempted to relax the vigour of the common law, with unfortunate consequences when normal conditions are restored. An additional argument in favour of Emergency Legislation is also the necessity of protecting the administration of justice from any appearance of harshness or unfairness, which is in itself the greatest of all social and public interests.

The Edward Fry Library of International Law.—The late Sir Edward Fry, in his life-time, attempted to establish an international law library in London, and not very long before his death expressed regret that his efforts had not been successful. His family, therefore, thought that the creation of such a library would be the best form of memorial to him. They have accordingly, with the object of setting such a library on foot, handed over to Trustees (Viscount Haldane, Sir Erle Richards, Professor Pearce Higgins, E. A. Whittuck, Esq., Sir Cecil Hurst, Professor Goudy and Charles P. Sanger, Esq.) the sum of more than £3,000. The London School of Economics has been selected as the habitation of the library. The Trustees, out of the sum of money in their hands, have thought well in the first place to purchase the library of the late Professor Oppenheim, comprising about 1,200 volumes. These, with some works of special personal interest belonging to the late Sir Edward Fry, will, in conjunction with those already in the library of the London School of Economics, form the nucleus of an international law library. The Trustees will, as far as possible, keep it up to date and in good order out of the interest on the sum of money that remains in their hands.

[1] *Legal Effect of War*, p. 98.

NOTES ON POINTS OF IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

Extra-territorial Legislation.[1]—The decision of the Parliament of Canada to seek an extension of the legislative powers of the Dominion raises a question of some delicacy. The proposal, as embodied in the Joint Address from both Houses of Parliament passed in June last, is to add to s. 91 of the British North America Act, 1867, the following provision:

"Any enactment of the Parliament of Canada otherwise within the legislative authority of the Parliament shall operate, and shall be deemed to have operated, extra-territorially according to its intention, and in the like manner and to the same extent as if enacted by the Parliament of the United Kingdom."

In commending the proposal to the approval of the House of Commons the Minister of Justice explained very clearly the intention of the Government; the point had arisen immediately from the question of regulation of aerial navigation; Canada desired to be able to lay down regulations, infringement of which by Canadian aviators outside the bounds of the Dominion should be punishable in the Canadian Courts. The power, however, to make an offence committed outside Canada punishable in the Dominion was at least doubtful, and it was essential to remove any question as to the authority of the Parliament. Under the authority asked for, if a Canadian citizen committed, *e.g.* in England, an offence against Canadian legislation expressed to have extra-territorial effect, he would, on returning to Canada, be liable to punishment there. If, however, his action had already been punished under English law, the rule against punishing a man twice for the same offence would doubtless be held to apply.

An obvious difficulty arises as to the classes of persons to whom the enactment is to be applied. The extra-territorial operation of Imperial legislation has been simplified by the fact that it binds British subjects in the widest sense of that term, but obviously it is not proposed that Canadian legislation should attempt to embrace so wide a sphere, although the terms of the proposed amendment are, strictly speaking, properly construed in this sense. It may be assumed, therefore, that in any enactment intended to operate extra-territorially the classes of persons to be affected will be specifically defined; normally, perhaps, the test of application may be residence in Canada for a defined period, or Canadian

[1] See *Journ. Comp. Leg.*, 3rd. Ser., ii. 328, 329.

birth or naturalisation, as suggested by the Canadian legislation as to immigration; but in some cases, at least, there must be a wider power. Thus, if Canada uses the authority to provide for the control of her naval vessels, the legislation must apply to all persons on these ships outside as well as inside Canadian limits.

A further question is the extent to which the Canadian power is to be exercised in respect of British merchant shipping. The Dominion already has the power to regulate in all matters affecting navigation and shipping vessels registered in Canada and vessels engaged in her coasting trade.[1] But under the extended power would she be able to regulate the property and civil rights of persons on these ships? The answer would apparently be in the negative, for it is not proposed to increase the scope of Dominion legislation but merely to give extra-territorial effect to enactments otherwise within its ambit of authority. On the other hand, the Dominion could make its criminal law apply to all British ships, to which at present English criminal law applies. The remedy for such a conflict of jurisdiction is in this case simple: Canada should apply her criminal law to British ships registered in Canada. To render this fully effective, however, it will be necessary that express provision should be made that, in the event of divergence between Canadian and Imperial criminal legislation, the former shall prevail in Canadian Courts, and be applied in British Courts, in regard to ships registered in the Dominion. Unless this is done, under the Colonial Laws Validity Act, 1865, the Dominion legislation would be void in so far as it was repugnant to the Imperial legislation. The supremacy of Imperial legislation, indeed, is probably incompatible with the new status of the Dominions, but in the case of Canada it cannot be renounced *in toto*, so long as it lies at the foundation of the Dominion constitution.

A further difficulty arises regarding the most important exercise of the extra-territorial authority of the Imperial Parliament, the regulation of the legal relations of British subjects in countries like China. It is clear that the powers of the Dominion Parliament are wholly inadequate, even when given extra-territorial validity, to provide a code for the government of Canadians abroad, and that recourse to Imperial legislation is still necessary, apart altogether from the fact that the Chinese Government certainly would be entitled to take exception to the creation of divided jurisdictions over British subjects. Canada, of course, cannot contemplate any intrusion into this sphere of imperial activity, but the matter is of importance, since it indicates that the grant of the change desired in the British North American Act is not intended to operate as an exclusion of the exercise of Imperial authority to the full extent which the terms of the amendment might suggest, when read in the light of the principle that the Imperial Parliament normally does not exercise any power which it has given to a Dominion Parliament. The conclusion, however, is inevitable that the proposed amendment is not happily framed, and that in the interests of

[1] See 57 & 58 Vict. c. 60, ss. 735, 736.

the Dominion it would be preferable if the powers sought were precisely and clearly defined by agreement with the Imperial Government. It may be taken for granted that there is no conflict of principle involved, and, if this is so, there is every ground for framing the grant of extended authority in such a way as to render perfectly clear the nature and extent of the power of the Dominion. This course is also supported by consideration of the nature of the authority which will be exercised and which will fall mainly in the sphere of criminal and penal legislation ; it is not desirable that any doubt should exist on topics of this character.

Imperial Cabinet.—Whatever extension of power is granted to Canada must, it would seem, be extended at the same time to the other Dominions, if they so desire. The precise nature, therefore, of the extension might well be decided upon at the meeting of the Prime Ministers of the Empire, fixed for June next. The announcement [1] that this meeting will be merely a continuation in peace of the Imperial Cabinet meetings during the war, has not unnaturally caused some surprise, in view of the terms of Resolution IX. of the Imperial War Conference of 1917, which contemplated the discussion of the constitutional relations of the Empire by an Imperial Conference " to be summoned as soon as possible after the cessation of hostilities." But the failure to convene this Constitutional Conference was, after all, inevitable ; the governments and people of the Dominions have been far too deeply immersed in local post-war problems to devote consideration to purely Imperial issues ; there is clearly no strong feeling in the Dominions in favour of the holding of a Constitutional Conference at an early date, and Sir Robert Borden, among others, has deprecated any hasty action. The extreme coldness of the reception accorded to Admiral of the Fleet Viscount Jellicoe's recommendations on naval defence is a clear indication of the natural reaction following the war and a warning of the necessity of caution in bringing forward any suggestions of closer Imperial co-operation.

It may be added that it would perhaps be well if these meetings of the Prime Ministers of the Empire could resume their old name of Imperial Conference. The term Imperial Cabinet suggests to some minds in the Dominions the idea that the Conference is an executive body, controlling Dominion policy. There is, of course, no foundation for such an impression other than the misleading and unscientific title, which might well disappear.

[1] Mr. Bonar Law in the House of Commons, Nov. 17, 1920.

NOTES.

The Canada-West Indies Conference.—The conclusion of a trade agreement between Canada and the West Indian colonies in June last, and its favourable reception by the colonial legislatures, are a satisfactory outcome of the closer imperial relations produced by common sacrifices in the war. Canada first gave tangible evidence of her anxiety to promote closer trade relations with the West Indies by including them in her unilateral preference system in 1897, but it was not until 1912 that some of the West Indian Colonies entered into an agreement with the Dominion which ensured preferential trade coupled with the improvement of steamship and cable communications. That arrangement is not due to expire until 1922, but it was partial and no longer meets the needs of the situation, though statistics show clearly that it did much to increase trade between Canada and the contracting Colonies. The new agreement, negotiated at Ottawa with the approval of the Imperial Government, which was represented at the discussions by Lieut.-Col. Amery, M.P., Under-Secretary of State for the Colonies, is of wider scope than its predecessor, and applies to the Bahamas, Barbados, British Guiana, British Honduras, Jamaica, the Leeward Islands, Trinidad, and the Windward Islands. Canada gives generous terms: customs duties on articles, the produce or manufacture of any of the Colonies, other than tobacco, cigars, cigarettes, and spirituous or alcoholic liquors, when imported into Canada, shall not exceed 50 per cent. of the duties on similar foreign imports, special rates being prescribed for sugar, rum, arrowroot, coco-nuts, grape-fruit, limes and onions. The Colonies all agree to give a specified preference on Canadian flour, spirits, wine, beer, and ale; on other goods (except tobacco, cigars, and cigarettes) Barbados, British Guiana, and Trinidad accord a preference of 50 per cent., British Honduras, the Leeward and the Windward Islands 33⅓ per cent.; Bermuda and Jamaica 25 per cent., and the Bahamas 10 per cent. Provision is made that on six months' notice any party to the agreement may make the concession of the preference conditional on direct shipment from the place of origin. Canada also undertakes to provide within three years an improved passenger, freight and mail service between the Dominion, Bermuda, the Leeward Islands, the Windward Islands, Barbados, Trinidad, and British Guiana, the Colonies contributing £27,000 as an annual subsidy, and by January 1, 1921, a service with British Honduras via Nassau and Jamaican ports, the Colonies to contribute 25 per cent. of any loss up to a total of £13,000.

The agreement is to come into effect, when approved by the legislatures of the contracting parties, on a date fixed by agreement and to be in force for ten years, and thereafter until terminated by twelve months' notice by the Government of Canada, or, so far as concerns itself, by any of the Colonial Governments. The Conference agreed also to recommend the laying of British-owned and British-controlled cables to connect Bermuda with Barbados, Trinidad, British Guiana, the Windward Islands, the Leeward Islands and Turks' Island or Jamaica. It is, however, doubtful whether this project can materialise in view of the high cost of cable construction.

A striking illustration of "the extraordinary spirit of Imperialism," which, as recorded by the Bahamas delegate, Mr. Harcourt Malcolm, marked the atmosphere of the Conference, is given by the terms of Article IX, which provides that the agreement shall not interfere with any existing preference, or with the granting of any future preference by the Dominion or any of the Colonies to any other part of the British Empire, or with any existing or future inter-colonial preference. The attitude thus adopted by the Dominion is in entire harmony with the express assurance given by Sir George Foster on May 31 in the Dominion House of Commons to Mr. R. Lemieux, that the Government had no responsibility for any movement in favour of annexation of the West Indies to Canada. This project has recently excited some interest in the Dominion; it may be supported on the ground of the comparative contiguity of the West Indian territories to the Dominion, the importance of counteracting the natural tendency of such islands as Jamaica to drift into closer relations with the United States, and the advantages of entrusting Canada with the control of dependencies, in order to assimilate her position to that of the other great Dominions. There are, however, serious difficulties in the way of any such course; the negro population and the Indian immigrants would undoubtedly prefer to remain under Imperial control, and the action of Canada renders it perfectly clear that she has no desire to use commercial considerations as a lever to secure political ends.

Mixed Marriages in Jamaica and Ceylon.—In Jamaica there is no legislation bearing on the subject of race mixture, nor is there any known case in which there has been a decision as to the degree of blood "making a particular person member of one race or another." Before the abolition of slavery the circumstance of colour operated with respect to the question of free man or slave, and section 20 of Jamaica Act, 21, George III, chapter xv. (repealed by 7 William IV, chapter x), provided as follows:

> And, for the better ascertaining who shall be deemed mulattoes, within the intent and meaning of this Act, be it further enacted by the authority aforesaid, "That no person who is not above three degrees removed, in a lineal descent, from the negro ancestor exclusive, except such as are now, under any laws of this Island, intitled to vote at elections, shall be allowed to vote or poll in elections; and no one shall be deemed a mulatto after the

third generation, as aforesaid; but that they shall have all the privileges and immunities of His Majesty's white subjects of this Island, provided they are brought up in the Christian religion."

"There are no laws in the island of Ceylon," writes Mr. L. Maartensz, "declaring marriages between any of the races invalid or a punishable offence, nor are there customs which forbid marriages between persons of different castes or races.

"The question to what race or nationality the child of a mixed marriage belongs is governed by s. 2 of the Matrimonial Rights and Inheritance Ordinance, 1876. This section provides that 'whenever a woman marries, after the proclamation of this Ordinance, a man of different race or nationality from her own, she shall be taken to be of the same race and nationality as her husband for all the purposes of this Ordinance, so long as the marriage subsists and until she marries again. Save as aforesaid, this Ordinance shall not apply to Kandyans, or Mohammedans, or Tamils of the northern province who are or may become subject to the Thesawalema.' The child of a mixed marriage is, by virtue of this section, of the same race or nationality of his or her father so far as inheritance is concerned; and it is mainly with regard to matrimonial rights and inheritance that the Kandyans, Mohammedans, and Tamils of the northern province have laws peculiar to themselves. Questions have therefore not arisen calling for decisions as to what degree of blood makes a particular person a member of one race or another.

"Questions have, however, arisen regarding the effect of marriages between Kandyans and maritime Sinhalese.

"The Kandyans are the Sinhalese inhabitants of the Kandyan kingdom. The provinces forming the Kandyan kingdom, which are situated in the hill country in the centre of the island, were conquered after the maritime provinces came under British rule.

"At the Convention of 1815 the Kandyan Sinhalese were allowed to retain their customary law. The Sinhalese of the maritime provinces are, on the other hand, governed generally by the Roman-Dutch Law and as to intestate succession by the Matrimonial Rights and Inheritance Ordinance, 1876.

"This Ordinance embodies the North Holland Law of intestate succession. In the case of *Marikar al* v. *Peter* (1899, 4 *New Law Reports*, p. 243), the question arose whether the succession to the estate of a Kandyan Sinhalese woman who had married a Sinhalese of the maritime provinces was governed by the Kandyan law or the Ordinance of 1876. The action was one for declaration of title to land which had belonged to the deceased woman's estate. She had died, leaving surviving her one child, who died a few days after, and her husband the defendant. The plaintiffs purchased the land from the deceased woman's mother and brother, who were her heirs according to the Kandyan law of succession. The defendant claimed the land as the heir of his wife and child according to the Ordinance of 1876. On his behalf it was contended

that s. 2 applied, and that the woman by her marriage became subject to the provisions of the Ordinance of 1876. For the plaintiffs it was argued that a Kandyan Sinhalese was of the same race as a maritime or low country Sinhalese, and that s. 2 of the Ordinance of 1876 did not apply. This argument was adopted and judgment was entered for the plaintiffs. In the case of *Kapuruhamy et al* v. *Appuhamy* ([1910], 3 *New Law Reports*, p. 321), a child of a low country Sinhalese man, who had become permanently settled in the Kandyan provinces and had married a Kandyan woman under the Kandyan marriage law, was held not to be a Kandyan."

As to the applicability of Kandyan law to Europeans and others residing in the Kandyan provinces, Mr. Maartenz writes : " The question whether the Kandyan law applied to Europeans who were domiciled in the Kandyan provinces was raised in the case of *Kershaw* v. *Kershaw* (*Ramanathan's Reports*, 1860–62, p. 157), and answered in the affirmative. This decision was overruled in the case of *Williams* v. *Robertson*, where it was held that ' it was not possible for Europeans or Eurasians settled in the Kandyan territory to acquire a " Kandyan domicile " as distinguished from a Ceylon domicile ' ; and that their wives were not by reason of their matrimonial domicile subject to the incidents of the ' Kandyan ' matrimonial laws so as to be capable of acquiring and holding property independently of their husbands. Both cases arose out of proceedings in bankruptcy in which the wives of the insolvents claimed to be entitled to immovable property against the assignees of their husbands' estates on the ground that they were governed by the Kandyan law. In the case of *Wijesinge* v. *Wijesinge* (9 Supreme Court Circular, p. 199), it was held that the Roman-Dutch Law and not the Kandyan Law of Succession governed the estate of a Sinhalese of the maritime provinces who had settled down in the Kandyan provinces. Following the principle laid down in the above cases, that the Kandyan laws applied to only the Kandyan Sinhalese, it was held in the case of *Narayane* v. *Muttusamy* ([1894], 3 *Supreme Court Reports*, p. 125), that the marriages of immigrant Tamils resident in the Kandyan provinces are not regulated by the Kandyan marriage laws."

Index to United States Legislation.—Since the fire in the New York State Library interrupted the publication of the index to all the laws in all the States of the United States, it has been very difficult for students in other countries to ascertain the latest laws upon a particular subject. This gap is now being filled, to some extent, by the publication of a loose leaf index to legislation, under the auspices of the Bureau of Government of the University of Michigan, of which Miss G. Elstner Woodard is the Director. Each card deals with a different subject, and subscribers may give a standing order for the cards, of which at least ten are issued monthly. It is proposed to extend the indexing so as to include England and Canada. An example of the value of the series is included in the cards which have been issued already. It gives a complete list of all

the States which have adopted the Uniform Sales Act, based upon Sir Mackenzie Chalmers's Act, with the exact references to the laws.

Conational Law.—A new solution is presented by Mr. Borris M. Komar of the long-standing difficulty to find a suitable name for the subject known as "conflict of law" and "private international law," in a periodical specially devoted to it, for the information of business firms and organisations as well as lawyers in the United States. The proposal is that the subject should be known as "conational law," which he defines to be "that body of the national legal rules which, either by legislative enactment, or through judicial action, is reciprocal with and tends to become common to all the national legal systems of the world. Etymologically it means a body of common, mutual or reciprocal national laws."

The first number of the periodical, which was issued in July, is known as the *Journal of Conational Law* (Conational Law Publishing Co., New York).

Portraits.—There are a few copies available of some of the portraits which have been published in the Society's *Journal*. They include Professor Dicey, Sir Edward Fry, Lord Herschell, Mr. Justice Oliver Wendell Holmes, Sir Courtenay Ilbert, Lord Macnaghten, Lord Russell of Killowen. The portraits are in some cases very difficult to obtain elsewhere, and they have been reproduced with an excellence which has made them an acceptable feature of the *Journal* for many years. Copies of the biographies accompanying the portraits are not available, but the portraits themselves can be obtained for one shilling each upon application to the Clerk to the Society.

Codification in Poland.—The April 1920 number of the *Bulletin de l'Institut Intermédiaire International* contained a note, supplied by their Cracow correspondent, of an interesting piece of legislative work proceeding in the newly created State of Poland. It appears that in the three areas divided a century and a half ago between Russia, Prussia and Austria and now combined in the new State of Poland, the Code Napoléon, the German Code and the Austrian Code, which respectively applied to the areas when separate, at present apply to the same areas within the combined State.

Under a law passed on June 3, 1919, a great Commission of Codification has been created. It is composed of forty eminent jurists drawn from the three areas. Its function is to prepare schemes for civil, commercial and criminal codes and schemes for civil and criminal procedure. The associations of jurists in the different parts of Poland are collaborating with the official organisation. Among the first items set down in the programme of the Commission are the elaboration of the rules to regulate the conflict of the laws operating in the several provinces and the establishment of a system of private international law.

The Crisis in Ireland.—In a pamphlet dealing with Federal Union through Devolution (Hodder and Stoughton, London, 1920), Lord Dunraven has brought together his views, expressed in letters and Parliament,

on the policy to be adopted in Ireland. The views of an Irishman, so able and well-informed, should receive full consideration, though they may not be accepted. It was published in opposition to Lord Monteagle's Bill to constitute Ireland a Dominion. While the root cause of the discontent in Ireland is her craving for political recognition of her distinct individuality, her craving for self-governing power, which can be satisfied only by complete separation from England—an impossible solution—he points out that, on the other hand, it is just as impossible " to do nothing until law and order is restored," as some suggest. Between these two extremes—yielding everything and yielding nothing—some middle course has to be found. He states the objections to Dominion Home Rule and to a Constituent Assembly, and suggests that ultimate unity (which he wants) is attainable only by duality, that is, by establishing two Parliaments, Northern and Southern, in Ireland, connected by a *liaison* Council. Having regard to the limitations—(1) the impossibility of creating an Independent Irish Republic, (2) the objections to coercing Ulster—before them, he considers that Government, in aiming at unity through dualism, have adopted the only course open to them. The proper middle course, in his view, lies in Federal Union between England and Ireland. To effect such union he would place as much power as possible in the hands of the two Legislatures, with full responsibility; and he would extend the powers of a *liaison* Council, without converting it into a Senate. In this direction he advocated the amendment of the Government Bill, which has now received the Royal Assent.

Finger-prints.—Mr. Gilbert Stone writes: " I observe that Professor Kenny, in his article in the last issue of the *Journal*, states that the Chinese Criminal Code contains the ' novel ' expedient of using a finger-print as a means of identifying the mark of an illiterate.

" It may interest your readers to be reminded that the same idea is contained in the Mines Act Rules (Burma), 1917, Reg. 6 of which provides as follows:

" When any person required by these rules, or by any special rule made under Section 21 of the Indian Mines Act, 1901, to make any report is unable to write, he shall be present when his report is written for him, and shall have it read over to him and shall attach his thumb-mark to it.

" I believe it will be found that several other examples could be given."

The Imperial Crown and the Foreign Relations of the Dominions.—Sir Hibbert Tupper writes: " In the article of Mr. H. Duncan Hall (3rd Ser. vol. ii. p. 196) reference is made to Sir Robert Borden, who spoke of ' a development in Colonial Government along the lines of an increasingly equal status.'

" These are, in reality, the views of a Father of Confederation, Sir John A. Macdonald. In these days it must be of interest to see what that great statesman foretold, and observe what prescience he had.

Speaking at a banquet in 1875, in the city of Montreal, in the Province of Quebec, he said :

"'Gentlemen, I look forward to a permanent union, and I look forward to it not as a mere Utopian speculation, but as practical result of our connection with Great Britain. It is not an idea of to-day ; and, if you would so favour me, if you think it worth your while to look over the debates on Confederation in 1865 at Quebec, you will find that what I am now stating to you I stated then as being the hoped-for future of Canada. It is this : that England would be the Central Power (applause) and we auxiliary nations ; that Canada, as one Confederation, would by degrees have less of dependence and more of alliance than at present ; and that we would be all united under the same sovereign, all owing allegiance to the same crown, and all inspired by the same British spirit ; and that we would have a close alliance, offensive and defensive. You see now the progress of events in carrying out this scheme. You see South Africa about to form a great Confederation. The position of the Australian Colonies is such, strewn as they are around the edge of that vast continent, that they may not be able to form a Confederation so closely allied as our Provinces of Canada, but a Zollverein and arrangements by treaty amongst themselves, by which their quota of land and sea forces, and their several subsidies for the purpose of doing their share in the defence of the Empire is quite probable. Now, gentlemen, twenty-five years is but as a day in the life-time of a nation ; let us go on as peaceably and happily as we are now going on, and twenty-five years, I fully expect, should see the solution of that question. Great Britain, by that time, will have forty millions ; Canada, ten millions ; Australia, her millions ; and these latter, with South Africa, capable of unlimited extension, and New Zealand, nearly as large as England, will be separate, auxiliary countries, all ranged around the Central Power, England. I do not look for colonial representation in the Imperial Parliament, because the Imperial Parliament, with such representation, would claim the right of taxation, but I look for the alliance of these auxiliary Powers with the Central Government under treaty arrangements similar to the existing arrangement between England and Canada. The arrangement at this moment is that we are pledged to expend a certain sum of money on our militia in response and return for the pledge obtained from England that the whole military power of the Empire shall be used for our defence ; make an extension of that arrangement by providing that the Central Power shall contribute so much, that each of the auxiliary nations shall give their quota, and then, when any nation goes to war with England, she will go to war with half a dozen nations. (Hear, hear, and applause.) It will give an assurance of peace to the world, and it will give an assurance of peace to us when it is known that if one extremity of the vast British Empire is attacked British subjects and soldiery from every extremity of it will rush to the rescue. (Hear, hear.) Then, gentlemen, so powerful will be England that she will be safe from all attack, and, instead of being a source of anxiety and a source of weakness to the British Empire, we will find ourselves standing by the grand old mother, become a defence, a fortification, an outwork, instead of being a weakness and a source of expense. (Cheers ; hear, hear, and prolonged applause.) Remember, too, that Canada

has already the fourth commercial navy in the world, and a large population of hardy seamen, and that all the Sister Colonies I have named must, for their position, become Maritime Powers. So that the Sovereignty of the Seas seems assured for all time to this United Empire. To this I look forward. It is a grand scheme, and it is a scheme quite capable of being carried into practical operation, and when carried out, gentlemen, it will not be too much to expect that the great nation, our congeners on the other side of the line, seeing that all the different peoples who speak the English language but themselves are formed into one great nation, as it were, for the purpose of operating as a moral police, and of keeping the peace of the world—it will not be too much to hope and expect that our congeners, speaking the same language, and being of the same race, will assist in the great work of keeping the peace of the world, and, if necessary, gentlemen, of enforcing it. (Applause.) Gentlemen, in the great war, when Napoleon, by the power of his arms, had forced the nations of Europe to close their ports against England and English shipping, even then, gentlemen, although England's colonies were few and feeble, she fought that battle, and carried it to a victorious conclusion, and drove the tyrant from his throne, with aid of the domestic commerce she had with her own colonies. And when all these become great nations, having one head, and being one people, and having one interest, England, if all Europe were in arms against her, with her trade, her commerce, and her wealth, with the waves rolling about her feet, would be still secure, living in her children, and her children blessed in her. (Loud and continued applause.)' "

Social Law Library, Boston.—*The Index to Legal Periodicals and Law Library Journal* (October 1920) contained an account of the Social Law Library, Boston. It is a library exclusively for members of the Bar, and is open neither to law students nor members of the public. It is analogous to the Bar Library in London, so far as use is concerned, but its scope is considerably wider. The aim is to cover the United States, Canada, and the British Isles " in very thorough fashion," so that the Library now contains about seventy thousand volumes. Originally festivities were mingled with the early proceedings of the Society by which the Library was founded, and on that account it received the title which has often been a matter of question and comment by readers of the list of members of the Society of Comparative Legislation in which it has been included for many years.

Maternity Benefit Systems.—An admirable report detailing some of the maternity benefit systems in foreign countries has been published by the Children's Bureau of the United States Department of Labour. The writer, Mr. Henry J. Harris, in an introduction, describes the three ways of aiding the mother at childbirth which are now in use in the leading foreign countries.

The first method is that of providing the mother, both before and after confinement, with skilled nurses, medical attendance, and helpful advice, for which she pays if she is able, but providing no cash benefits. This method has been developed most thoroughly in New Zealand by a voluntary organisa-

tion and excellent results have been secured. The second method is that of furnishing outright a sum of money on the birth of a child, the State supplying the funds. The third method is that of insurance, of collecting money in advance from the insured persons, their employers, and in many cases from the State, so that money, aid, and medical and institutional care are available when the birth occurs. As most of the leading countries of the world now have in operation systems of sickness insurance for the greater part of the population which would need maternity aid, the maternity systems have been combined with the sickness insurance systems to avoid creating a second piece of administrative machinery. In one country, Italy, where there was no system of sickness insurance, an independent maternity insurance organisation was developed.

Australia, Austria, Bosnia, Denmark, France, Germany, Great Britain, Herzegovina, Hungary, Italy, Luxemburg, Netherlands, New Zealand, Norway, Roumania, Russia, Serbia, Sweden, and Switzerland have some form of cash benefit for mothers during maternity.

It is worthy of note that the interest in maternity relief was not due to the frightful loss of life caused by the war, though the war has directed the attention of the world to the subject of infant mortality and the care of mothers during childbirth to a greater extent than ever before. In 1910 Italy instituted a national maternity insurance fund; the health insurance laws of Great Britain and Switzerland came in 1911; Russia and Sweden passed similar laws in 1912, while Australia in 1912 and France in 1913 provided special systems of allowances to mothers during childbirth. The whole movement may be said to be due to realisation of the fact that the health of the wage-earning population is one of the greatest responsibilities of the State, and that the care of the woman wage-earner, especially the mother working away from her home, is peculiarly important under modern conditions.

There is much variety in the industries and occupations protected by these laws. At the one extreme is Australia, which has ignored industries and occupations altogether by declaring that every woman shall receive the substantial sum of $25 on the occasion of childbirth. The health insurance systems of Germany and Great Britain cover the greater part of all industries and occupations. Italy, on the other hand, restricts membership in the national maternity insurance fund to wage-earners in manufacturing industries, and women employed in rice-fields. The restrictions are usually due to the difficulty of providing administrative machinery to meet the special conditions—for instance, in the home-working industries, in the case of casual workers who change employers frequently, or in the case of agricultural workers who would be scattered thinly over wide areas. Because some countries have special legislation affecting domestic service, such as requiring the employer to provide medical care for servants living in his household, this occupation is frequently omitted from health and maternity benefits of the insurance systems. In recent legislation there is a clearly marked tendency to include all occupations and all industries in systems of health insurance, and this is particularly true of maternity insurance and benefit systems.

The scope of the maternity benefits is also varied by the limits on the persons included. There is a general agreement on the inclusion of wage-

earners; salaried employees—that is, those who are engaged in clerical work, in the minor administrative positions, etc.—are sometimes omitted because they usually have a more permanent employment status than those doing the work involving physical labour. As a rule, there is a restriction on the class of persons insured by excluding those earning more than a specified sum; in Great Britain the limit is placed at £160 (about $800) [now £250] annual earnings; in Germany it is 2,500 m. (about $600).

Great diversity of practice exists in the treatment accorded the wife of the wage-earner who is not herself insured. Under the British law she is entitled to maternity benefit; under the German law it is optional with the local organisation which administers the insurance to provide the maternity benefit, although the special laws in force during the war provide practically the same benefit as for the woman included because she is a wage-earner. The tendency in the recent legislation is to make liberal provision for the wife of the insured wage-earner.

The benefits provided by the various countries consist of, first, a sum of money either in one payment or in weekly payments; second, medical and surgical service and medicine; third, a small weekly sum paid while the mother herself nurses the child.

As in most countries it is the wage-earning woman who is protected by the insurance system, the maternity benefit is practically a partial substitute for wages. The usual amount varies from 50 to 75 per cent. of the wages, with a tendency in the recent laws to increase the amount to either full wages or close to that amount.

The time during which the sick wage is paid ranges from two to twelve weeks. In most of the countries this period is divided, two to four weeks coming before childbirth and the rest of the period after that date.

The British and Australian plans simply grant a specified sum to the mother, to be paid on proof of the birth of the child. This method simplifies the administration, but the reports of the operation of the laws seem to indicate that it produces less satisfactory results. The weekly sick-wage payment plan makes it possible to require the mother to refrain from factory or other work under penalty of withholding the benefit.

One of the more recent provisions is that for nursing mothers. This is granted by Germany, Switzerland, Roumania, France, and Austria, and consists of an amount varying from half the regular benefit in Germany to a sum of 50 centimes daily in France. The benefit is paid for a period ranging from four to twelve weeks.

All sorts of combinations have been made in distributing the expense. At one extreme are Roumania and Denmark, where the wage-earner pays the entire cost, though there is a slight amount of aid from the National Government; at the other extreme are Australia and France, where the Government bears the entire cost. The majority of the systems distribute the cost among the insured persons, the employer, and the State, with the wage-earners bearing the largest share.

The Study of Comparative Law.—Elsewhere in this number is published an admirable study on Illegitimacy by a law class under the direction of Professor Harrison Moore in the University of Melbourne. The subject is one which is attracting attention in many countries, and may

be commended to the consideration of other law faculties. In that way the value and suggestiveness of studies brought together in this Journal will be appreciated, not only by law-makers, but by the large number of workers in many departments of life who are considering various amendments, and advocating reforms which lie outside the province of the Society of Comparative Legislation. There is a growing appreciation of the fact that the practical experience of the laws in operation in other countries is of immediate interest. The increase in the membership of the Society among non-legal bodies is evidence of that interest which can always find material for study in the annual review of legislation published by the Society comprehending, as it now does, every part of the Empire, the United States, and some foreign countries.

The Comparative Study of Industrial Law.—The appointment of Dr. Royal Meeker, the United States Commissioner of Labour Statistics, to be Chief of the Scientific Division in the International Labour Office of the League of Nations at Geneva, will be heartily welcomed by all who are interested in the comparative study of industrial law. One of his functions will be to collect information with regard to the social and economic problems of the whole world, and the " Monthly Labour Review " of the U.S. Bureau of Labour Statistics is his adequate testimonial of fitness for this task. Founded by Dr. Meeker in 1915, in order to bring his Department into " closer touch with current labour activities " and to " give wider publicity and deeper significance to such activities," the " Monthly Labour Review " has become the mirror of industrial legislation not only in the United States but throughout the world. Due probably to his appreciation of the desirablity of presenting serious matter in an attractive guise, the circulation of his Review doubled during the five years of its existence, and he has handed over to his successor a periodical with a circulation of nearly 20,000 copies a month. The " Monthly Labour Review " now takes so wide a sweep that it is impossible to summarise its contents. The September 1920 issue, for instance, contains some seventy articles arranged under nineteen main heads, dealing with subjects so diverse as " Labour colonies for the feeble-minded " and " Social Attachés at Foreign Embassies " ; " Negro labour in the Stove Industry," and " Establishment of Italian Ministry of Labour." It must suffice to say that in the five years' issues of Dr. Meeker's Review there will be found the material for an adequate history of the development of every branch of industrial law. Furthermore, unlike some other official publication, it is neither dull in treatment nor forbidding in its form.

NOTICES OF BOOKS.

A HISTORY OF THE PEACE CONFERENCE OF PARIS.

THE primary object of the recently founded British Institute of International Affairs is the encouragement of the study of international questions, and one of the means is to be the publication, or help towards the publication, of works which have that as their object. At its inaugural meeting Lord Grey of Fallodon interpreted the function of the Institute as a call for the facts, whence comes knowledge, for a presentation of the relation of the facts to each other, which is comprehension, and for an appreciation of the relative importance of the facts, which is perspective. The canons and the spirit of History, which is dispassionate inquiry into the past and its interpretation, are thus to be the guide to the Institute, and to mark the measure of its success in its study of international conditions and policy of to-day as well as of yesterday. The *History of the Peace Conference of Paris*,[1] of which the first volume lies before us, invites submission to these tests, for, according to the title-page, the work appears under the auspices of the Institute; and yet there is a reservation, since the editor tells us that, while the *History* owes its origin to the Institute, the Institute, inasmuch as it "has no foreign politics," could not stand sponsor to the work and to the views it expresses. The editor, both for himself and in relation to his staff of contributors, has quite clearly been faced with the difficulty of presenting history and yet expounding an ideal. The aim, we are informed in one passage, has been "to produce a history at once independent and objective"; and the general principle, or guiding thread, we are told in another passage, has been "the attempt to exhibit the Peace as a great constructive experiment." To these partly conflicting forces let us add that there are more than a dozen contributors to this first volume, that they are English and American, that the editor has not controlled the expression of opinion by the several unsigning contributors, and that there cannot for a long time be forthcoming—if ever—a definitive History of the Conference: we are getting the leading facts and standards for judging this vast work. Already a large mass of information is available regarding the Conference. It exceeds, we are told—in quantity is meant, for the winnowing process has still to ensure quality—the material available for the understanding of the Congress of

[1] *A History of the Peace Conference of Paris.* Edited by H. W. V. Temperley. Vol. i. (pp. xxxi + 517). (London: Henry Frowde and Hodder & Stoughton, 1920.)

Vienna about half a century after its last meeting; and this work, through being written now, will do much to produce and preserve the atmosphere in which the Conference lived and laboured. The conditions being what they are, we prefer to regard the work as a contribution towards a History of the Conference—material in fact and in view for the historian-to-be. We shall wait for and welcome similar contributions from France, Germany, Italy, Japan and other sources. There is much of high value in this first volume that touches these States, especially in the chapter (in Part II) on the material effects of the war upon neutrals and belligerents in 1918. But, in a long view of a great subject contentious for study and for presentation, we do well to take the work before us as English or Anglo-American in character, even while we admire the striking measure of objectivity in the presentation of facts, motives and impressions by those who were themselves " actors or observers of the drama."

This first volume is devoted to the Preliminaries of the Peace, and is in three parts. The first part examines the military, naval, and political considerations that impelled Germany to seek peace. Stress is laid on the point that it was the Higher Command that insisted on negotiations being begun that led to the Armistice—that there is no evidence that the breakdown on the field came from a breakdown " at home." That seems a sound view, and, while we accept the general reasoning in an earlier chapter on the " psychology " of defeat, we prefer to say that the entry of the Americans into the war convinced the bulk of the German people rather that their cause was not a winning one than that it was a " wrong " one. We must have regard to the Roosevelt mind when we are analysing and appraising the Americans, in the conduct of war: " the American people want Germany smashed." The second part of the volume treats of " Europe in Dissolution." It contains a useful chapter already referred to, a slightly misplaced chapter on the war-aims of the belligerents, a chapter on the war-aims of Labour which might have been better presented in extracts in an Appendix, and a carefully constructed chapter on the Bolshevik attitude at Brest-Litovsk, concluding with a statement too attractively introduced as " the effect of the Bolshevik ideas upon Western political thought." The third part of the volume is of very high value. Together with an Appendix, it gives us the organisation and executive working of the Conference. It is sufficient in itself to make this volume noteworthy and of lasting worth. Further, there are appendixes of value, and in particular we are given the texts of all the Armistices.

But we are without some things. It is surprising that, with the array of historical writers who are responsible for this volume, we are not provided, in this appropriate place, with the historical background of the new Europe that is, or is to be. There is a like failure, on the historical side, in treating of the pronouncements of President Wilson on a League of Nations—a subject on which a compact and very useful

volume,[1] has been recently published under the auspices of the International Intermediary Institute, the Hague. "What we seek is the reign of law, based upon the consent of the governed, and sustained by the organised opinion of mankind." That is rightly taken to be the cardinal *sententia* of Mr. Wilson, and it is several times produced in the first volume of the *History* (it is exhibited by one of the contributors in the embarrassing dress, "the consent of the government"). But we are not shown how the League of Nations, as founded in principles and as projected in fact, stands to the Society of Nations of the great authors of international law, and to all the higher traditions of international law. More: Mr. Wilson, student of past politics and of the history of political thought, would be the first to urge that the ancestry of his own faith and teaching is all too slenderly shown and suggested here; and let us say that, in so far as it is "American"—and American in small part only it is—there is much to be gleaned from Presidential addresses of about the first thirty or forty years of the American Commonwealth. Nor can we accept the view that Mr. Wilson's pronouncements constitute a "definite," though they may be a "coherent," body of political doctrine. It is their spaciousness and indefiniteness that have made them at once subversive and creative and inconclusive in their influence. We have other marginal jottings, touching, for example, the use and varying hypotheses of terms and phrases, as "nationalism" and "democracy"; and it may not be too late to say that in "self-determination" the "self" is as important in fact and in analysis as the "determination" and the right to determine.

Some things we miss, and, among them, a habit of mind. Negotiation, a competent observer and agent said more than a century ago, can only devise or discover the terms on which the reconciliation of interests that are reconcilable may be effected, but, given interests that are truly opposite or contradictory, then adjustment can be forthcoming only by renunciation on one side or the other. A little reflection on what is involved in this and other seeming truisms might have added to the acuteness of observation, exposition, and reasoning of contributors to this volume; and they have need of courage in the discharge of their task, and need of rare judgment. Are there moments when what is called prudence is not wise? And what did Lord Beaconsfield mean when he wrote to Lord Salisbury in September 1878, that "we must control, and we must create, events"?

There is much in this volume that we are glad to have from first-hand knowledge and an inside view—for example, the "great prestige" gained for the English language, one of the "smaller causes" of which may have been that, while M. Clemenceau knew English very well, neither President Wilson nor Mr. Lloyd George could express himself in French; the origins, function, and power of the Council of Four, and

[1] *Documents on the League of Nations.* Compiled by Mrs. C. A. Kluyver, with a Preface by Dr. C. Van Vollenhoven. Pp. x + 367. Leiden: 1920.

the transition to the power of "the Three"; the open secret that the wording of a vigorous letter of a joint committee in the final stages of the Treaty discussions was due chiefly to the British member; the question—almost the mystery—of the place of "experts" at the Conference (we are told that at the opening of the Conference none of the British experts on one country had ever been in that country); and the relentlessness of the triumph of secrecy in the making of compromises and of momentous decisions. Questions publicly introduced, privately settled: the formula of the Congress of Berlin (and of the conduct of much of the business of the world), as transmitted to Queen Victoria, has ample confirmation at Paris; and we may have still to learn what was done at and after dinner, and should you not smoke in such circumstances, if the host does—Queen Victoria was informed—"you look like a spy."

In depressingly large measure the history of Congresses is a record of futility—of nothing done, or of evil done, or of little done that was worth doing and was lasting. The treaty-making power itself is a necessary instrument. Like a law, it may remove "hindrances to the good life." But, also, like Government intervention in the domestic sphere, it is often an evil, though a necessary one, and may be over-applied. Compacts of an improvident character, not immediate or not certain in respect of the terms to be interpreted and applied, are, in general, to be shunned. Danger still lies in professing to compass more than can be compassed. But we can all accept the conclusion of one of the authors of this *History*: "The problem now is to ensure machinery both for the revision of the Treaties and the consideration of such matters as either proved too difficult to find any solution at Paris, or were deliberately ignored there. This machinery must respond to the informed opinion of the peoples of the world. That the statesmen of the Paris Conference have perhaps made such a process possible is their greatest claim to the gratitude of posterity."

D. P. Heatley.

INDIA IN 1919.[1]

A section of the "principal Act" for the Government of India (5 and 6 Geo. V. c. 61, amended by an Act of 1916) requires an annual statement "exhibiting the moral and material progress and condition of India" to be presented to Parliament. Hitherto the India Office has been content to produce a compilation which no human being, unless compelled to do so for some specific purpose, cared to consult. The yearly Statement reproduced a quantity of statistics (culled from a large number of annual

[1] *Statement exhibiting the Moral and Material Progress and Condition of India during the Year* 1919. Fifty-fifth number. Presented to Parliament by command of His Majesty. (London: Printed and Published by H.M.'s Stationery Office, 1920. [Cmd. 950.] Price, 3*s*. 6*d*. net.)

reports written in India), welding them together with a minimum of descriptive analysis, so that the whole was served up in a repellent form. The value of the material was depreciated in its presentation. It is never easy to convey information regarding India to the British public in an interesting way. For the first time this Parliamentary Blue-book (as it really is), the fifty-fifth of the series, has been prepared by an officer specially selected for the duty, whose literary skill, knowledge, and ability have enabled him to make so comprehensive an "Administration Report" not only possible, but attractive, reading. His success is not unprecedented. At a university dinner in Calcutta in the early seventies Bishop Milman epigrammatically described the Lieutenant-Governor's (Sir George Campbell's) first Administration Report of Bengal as "complete as a circle, clear as crystal, and amusing as a novel." The official material available to the author was contained in Indian Reports, of which the mere titles cover four full pages of an Appendix, and he has evidently incorporated matter derived from other sources. Now, any one searching for authoritative information on the recent past and present condition of India can read a handy volume with profit and pleasure. Lord Curzon tried in India to get official Reports curtailed and better prepared. He met with only partial success. It was easier for a hard-worked officer to submit a *rudis indigestaque moles* than to turn an "office draft" into a literary monograph, agreeable to read. But it can be done, as instances show. The year 1919, with which this volume deals, was remarkable for some important events, such as an Afghan War, the political disturbances, especially in the Panjab and Bombay, and the passing of the Act to carry out the constitutional reforms based on the Montagu-Chelmsford report and scheme. Each of these subjects is treated at adequate length; the ordinary reader will require nothing more. The Afghan War lasted only a few weeks; peace was soon signed. The allegations of its mismanagement are set out and examined in the chapter on External Relations, which includes Border Policy, Military Requirements, and the reference of Army Reform to Lord Esher's Committee. In "Internal Politics" the progress of revolutionary movements is fully traced. The legislative measures known as the Rowlatt Bills (the outcome of the Sedition Committee presided over by Mr. Justice Rowlatt in 1918) are clearly outlined, the agitation arising from Mr. Gandhi's passive resistance policy, the course of the disturbances and their suppression, culminating in General Dyer's action at Amritsar on April 13, the seriousness of the situation, the difficulties of the Government, the Indemnity Bill, the assembling of Lord Hunter's Committee of Inquiry, the Khalifat agitation, the attitudes of the Mohammedans, the Moderates and Extremists, are recounted with judicious impartiality. The King's Proclamation, issued when the Constitutional Reforms Bill received the Royal Assent, is said to have had a profound effect: over 1,300 offenders benefited by the amnesty which followed. Wars and disturbances pass away, permanent effects have

other causes. The author rightly observes that the outstanding event of the year 1919 was the introduction of the new scheme of constitutional reform. He has given an excellent summary, which cannot be further summarised here, of the previously existing constitution of India, of the genesis and course of the modifications in the constitution and machinery of Government, and has wisely exercised his discretion in showing in Appendices the complete text of the India Act XI of 1919 (*An Act to cope with Anarchical and Revolutionary Crime*), and the Parliamentary Statute 9 and 10 Geo. V, ch. 101 (*An Act to make further Provision with Respect to the Government of India*). But still something further is required. This Parliamentary Statute of 1919 has, in a Schedule, made so many amendments in the principal Act above mentioned that only a further edition of the three statutes taken together can clearly exhibit the complete constitutional law of India. This might be included in the next annual Statement for 1920. All the important subjects are passed in review—finance, famine, trade, education, economics, industries, science, sanitation (with a note of despair), and many others, which can be found easily from the Contents and Index. More might perhaps have been said about coal (the extent of the outturn and trade), and the Port Trusts, some of the best-worked bodies in India. If space were a consideration, it might have been rendered available by omitting the duplicated publication of the King's Proclamation, reprinted as Appendix V. But it would be ungracious to dwell on minor points. If the year 1919 closed full of hope (as the author states in his Foreword), it was realised in 1920?

C. E. Buckland.

LABOUR CONDITIONS DURING THE WAR.[1]

On turning over the pages of Professor Hammond's temperately written book one is immediately struck, first, by the minor part played by actual legislation in our industrial history during the war as compared with the importance of agreements, orders, etc., and, secondly, by the fact that, temporary as much of this legislation was, its origins and effects should, for a long time to come, be borne in mind by any politician, educationist, or economist who is ambitious of remoulding the social order.

For this reason a summary written by a sympathetic observer is to be welcomed. Even serious students who have consulted many of the Government and other reports quoted by Professor Hammond may be glad that someone has, to a certain extent, co-ordinated this mass of information without attempting to draw a moral therefrom. Fortunately for our national self-respect, the war-time legislation is given with a certain amount of historical and contemporary background,

[1] *British Labour Conditions and Legislation during the War.* By M. B. Hammond. (Preliminary Economic Studies of the War: Carnegie Endowment for International Peace.)

although this loses somewhat from the omission of any full description of the parliamentary activities of August 1914, and from the fact that the survey is concluded before the passage of some of the almost revolutionary measures of 1918, which were the sequel of, if not originated by, our war-time experiences.

Taken apart from this setting, legislation immediately and indirectly concerned with industry between 1914 and 1918 presents a somewhat confusing complex of experiment, failure and occasional success. Taken in conjunction with the accounts of unrest, disputes and military exigencies, there is at least discoverable a *raison d'être* even for apparently glaring inconsistencies. Educationists would do well to study the aspects of the national psychology that were undoubtedly the cause of much of the circuitous expediency with which it is the fashion to blame the Government. The simultaneous widening of the franchise and of educational opportunity which followed close upon the termination of hostilities will either accentuate such difficulties in any future crisis or go far to eradicate them.

Emergency war-time legislation is now very largely a matter of past history. The object throughout was simple. Legislation aimed at securing the necessary output of munitions for the Allied armies, while releasing the largest possible number of men for active service ; in other words, the considerations were output and the distribution of labour. In the first place, the Government relied on orders issued under s. 150 of the Factories and Workshops Act. This proving insufficient, large powers of control were taken by the Defence of the Realm Consolidation Act, 1915, which served as a basis for negotiations with the Trade Unions regarding output, relaxation of restrictions, dilution and avoidance of stoppages of work. The agreements reached were fully as important as actual legislation, and led to further legislative attempts to control the labour situation, expressed in the Munitions of War Acts (1915–17). These frankly temporary expedients would probably have been more successful if the suspicion which has become a serious menace to social stability had not given rise to a haunting fear that they were in reality destined for permanency. To this suspicion may also be traced many of the complexities of the Acts themselves—complexities which, in fact, amounted to a species of camouflage. In effect, the Government finally obtained practically unlimited powers of control (not necessarily fully exercised) over all plant and all work carried on, thus evolving a system at least suggestive of industrial conscription. In return, the principle of limitation of profits, resulting in the excess profits tax, was adopted, and the famous pledge was given which was redeemed by the Restoration of Pre-War Practices Act, 1919.

The unrest caused by the restrictions on the mobility of labour was sufficient to cause the repeal of some of these provisions while war-peril was still at its height. A further important departure was the establishment of what amounted to a system of compulsory arbitra-

tion as far as munition work was involved. Equally important is the fact that this compulsion was not effective in preventing strikes, and that a return was made to the time-honoured principle of voluntaryism in the Industrial Courts Act, 1919, which superseded the temporary legislation.

With regard to man power, the National Registration Act, 1915, and the establishment of a Ministry of National Service served for little but to modify the problem.

The development of wage regulation would require an article to itself. Its immediate result has been a rapid extension of the Trade Board system during 1919 and 1920, facilitated by the Trade Boards Act, 1918.

War-time legislation, taken by itself, has not a record of success. Taken in conjunction with other factors and with the concurrent voluntary experiments, etc., it becomes apparent that the nation was but being true to its traditions, and endeavouring to feel its way rather than to impose a ready-made "Constitution," and that the worst failures were associated with excursions into what is colloquially termed Prussianism. Again, the encouraging fact emerges that "reconstruction"—*e.g.* social and industrial reform—has been stimulated rather than retarded during the war. Whether that stimulation will continue to operate depends more upon the conditions of national finance than is generally recognised.

M. C. M.

COMMONWEALTH AND STATE POWERS IN AUSTRALIA.[1]

All lawyers interested in the public affairs of the Commonwealth have already reason to be grateful to Sir John Quick for his services in making clear the outlines of the Constitution of 1900. The *Annotated Constitution of the Australian Commonwealth*, which, in co-operation with Sir Robert Garran, he published on the eve of the inauguration of the Constitution, is well known and valued; and it was quite time that a new edition of it, embodying the results of twenty years' experience, should appear. As Sir John Quick himself admits, the earlier work was, necessarily, in the nature of prophecy, a form of literature of which lawyers, unlike theologians, are proverbially shy. But, as Sir John Quick also mentions in his Preface, the claims of the war on the time of his former colleague have rendered the project of a new edition of the original work impossible; and the book now under review must, for the present at least, be accepted as a substitute for it.

It is, no doubt, a matter of regret that the plan of a joint edition had to be given up; but Sir John Quick, by the comprehensiveness of his new production, and his success in incorporating in it notes prepared by Sir Robert Garran for the abandoned edition, has gone far to compensate

[1] *The Legislative Powers of the Commonwealth and the States of Australia, with Proposed Amendments.* By the Honourable Sir John Quick, LL.D., Barrister-at-Law.

his readers for the change of plan. Not only has he again reprinted the text of the Commonwealth Act, but he has now been able to elucidate that text by reference both to judicial exposition and to the exercise of the powers conferred by it. Thus the new work is, in effect, a history, not merely of the development of the Constitution, but of its working; and this in a form which, however trying to the literary reader and the philosopher, is a form beloved from of old by practising lawyers.

We gather, moreover, from the Preface, that the author's interest in the working of Australian politics is by no means purely theoretical. This Preface was written shortly after the return of Mr. Hughes to Australia, and after the latter had launched his appeal for more federal powers to enable him to deal with the problems of industrial unrest and profiteering, then urgently demanding attention. In the view of Sir John Quick, these demands were not justified; and inasmuch as, since the publication of his work, the electors have apparently vindicated his judgment by refusing, on a referendum, to adopt the proposed amendments of the Constitution, it might seem as though the controversy were dead. But we gather that, though the Prime Minister and Sir John Quick may differ about means, they are agreed as to ends; for it appears that, in our author's view, the Constitution already enables the Federal Government to deal effectively with the problems mentioned.

We are bound to say, however, that, in our judgment, Sir John Quick hardly makes out his case, even on his own showing. He suggests that by taxation, by "fixation," and by acquisition, the Federal Government may do indirectly what it cannot do directly. But is not this line of argument, though characteristically lawyer-like, just exactly an exhibition of that side of the legal mind which is least likely to commend itself to a wider public? Thus, for example, while freely admitting, in one part of his work (pp. 332 ff), that the apparently unlimited powers of taxation conferred on the Federal Parliament by the Constitution (s. 51 [2]) must be regarded as qualified, both as to method of exercise and scope, by the express and implied limitations of other parts of the Constitution, our author suggests that profiteering might be stopped by a tax imposed solely with that object, in spite of the fact that the powers of the Commonwealth Government to deal with trade and commerce are limited to international and "inter-State" relations. Again, while it is clear that the legislative powers of the Commonwealth with respect to trade and commerce, are restricted by the Constitution (s. 51 [1]) to foreign and inter-state commerce, Sir John Quick suggests that, indirectly, trade and commerce within a State might be controlled by fixing prices for foreign and inter-state transactions; though an amendment proposed with the express object of widening the Commonwealth powers had, when he wrote, twice recently been rejected on Referendum, by substantial majorities. Doubtless, if Sir John Quick, with his intimate knowledge of pre-federal history, can satisfy himself that the extensions which he advocates were really intended by the framers of the Constitution

to be included in the apparently contrary words of the empowering section, he is morally justified in his proposals; though it must be confessed that the sight of a Responsible Government endeavouring to obtain a reversal of a thrice-recorded electoral veto, by exegetical arguments in the Law Courts, is hardly inspiring to believers in self-government. But, in fact, there seems to be very little historical support for such a belief, in view of the well-known circumstances in which the Commonwealth Constitution was framed.

We must not, however, be deflected from our gratitude to Sir John Quick for his new literary gift by any differences of opinion with regard to policy. For the industry, learning, and accuracy embodied in the work under review, all students of Australian affairs, whatever their immediate objects, owe him hearty thanks.

EDWARD JENKS.

A TEXT-BOOK ON THE LEAGUE OF NATIONS.[1]

IN his Preface Sir F. Pollock states that the purpose of his book is to give a practical exposition of the Covenant of the League of Nations, with so much introduction as appears proper for enabling the reader to understand the conditions under which the League was formed and has to commence its work. The book ably achieves this purpose, and does a good deal more. It includes a detailed and critical examination of the meaning and effect of the various articles of the Covenant; a concise historical account of past attempts at international organisation, and of the growth of ideas of international law and the development of the practice of international arbitration; and a description of the circumstances and movements of opinion out of which the Covenant arose. It includes also many sage reflections upon the possibilities and probabilities of international progress. They carry the weight which naturally attaches to the opinion of an observer and critic of ripe experience, well versed in public affairs and amply equipped for dealing with the particular matters upon which he discourses.

Those who base great hopes on the future of the League of Nations will be well satisfied to find that so competent an authority as Sir Frederick Pollock not only shows himself a convinced advocate of the League as a practical and necessary instrument of world organisation, but looks upon the Covenant, in its present form, as containing probably the best and most tolerable type of constitution attainable by the League at this time.

He justifiably regrets the absence from the Covenant of any provision for the systematic revision or consolidation of the law of nations, which, he says, is a work that ought to be taken in hand, and one for which only the League is competent. He advocates the appointment by the

[1] *The League of Nations.* By the Right Hon. Sir Frederick Pollock, Bart., D.C.L., LL.D. (Stevens & Sons, Ltd., 1920. 10s.)

League of a permanent expert commission to assist in the formulation of international laws.

Special satisfaction is expressed with the broad, and almost vague terms in which some of the articles of the Covenant are couched, and particularly those dealing with the settlement of disputes and the restraint of war. The Covenant is not a rigid constitution based on cut-and-dried formulas, but an elastic framework to be moulded and expanded as time and experience dictate.

He also specially welcomes the inclusion in the Covenant of Articles 22 and 23, which deal with mandates and with social and economic conditions, and give the members of the League large scope for the co-operative exercise of positive endeavours for the good of humanity, as distinguished from the merely negative system of mutual insurance against war. The nations are made active partners in a large field of humane undertakings, and the author sees no assignable end to the fruit of good works which these articles may bring forth.

He rightly attaches the greatest importance to the institution for the first time of definite automatic and permanent machinery for dealing with specific disputes and causes of dispute between nations. Neither the war of 1870 nor the war of 1914, he says, could have been started in the face of a standing council of the Powers to whom the dispute could have been referred without the delay of preliminary negotiation.

No doubt the authors of the Covenant had a task of extraordinary difficulty and novelty to perform, but Sir F. Pollock perhaps tends rather too kindly to gloss over the defects of their workmanship. He is on safe ground when he remarks that it seems far from unlikely that the Covenant may be supplemented by a group of amendments before it is many years old.

F. N. KEEN.

A VOLUME OF ESSAYS.

IF any reader fails to find enjoyment and profit in perusing these eleven papers[1] by the President of the Board of Education he must be hard to please and satisfy. They treat of subjects generally important and always interesting: as might be expected from Mr. Fisher, *nihil quod tetigit non ornavit*. Though they have already appeared elsewhere they are welcome, gathered together in this collected form. They convey the impression that they deal completely with the material available, and bring out the substance clearly without any superfluous writing. Many persons may confess that Ammianus Marcellinus, "the last of the Latin historians," had never been anything but a name to them. But for the twenty-five years A.D. 353–78, he, a Greek of Antioch writing in Latin, was an honest, impartial writer,

[1] *Studies in History and Politics*. By the Right Honourable Herbert Fisher. (Oxford, at the Clarendon Press, 1920. 12*s*. 6*d*. net.)

who deserves to be better known. His robust faith in the permanence and power of the Roman Empire characterised his outlook upon his own age. His successes in personal portraiture included a study of his master, the Emperor Julian, the Apostate. The list of the remaining papers shows that Mr. Fisher has devoted much attention to French and German history and personages. They include the political writings of Rousseau, Ollivier's Memoirs, a Leaf from a Corsican Note-book, Lord Acton's Historical Work, Modern German Historians, Imperial Administration, French Nationalism, the Value of Small States, the Resurgence of Prussia, Thoughts on the Influence of Napoleon. Rousseau, evidently, cannot be disregarded as merely "a very bad man" (according to Dr. Johnson), or as only the author of the impossible *Contrat Social*. Ollivier's share in the events of 1870–71, so momentous to France, is exhibited in the review of his sixteen volumes of apology for his political career. The tribute to the late Lord Acton as a learned and laborious historian will add to his reputation. His judgment, we are told, was not paralysed by his great learning. His standpoint, as an historian, both a strong Liberal and a convinced Roman Catholic, was certainly unusual. German Imperialism owes much to the national historians. "It is not too much to say that the historians of the Prussian school have been the principal architects of the political creed of modern Germany." The message of Treitschke was "in essence identical with the creed of Mommsen, Droysen, Sybel—the necessity for a strong Germany, united under the Prussian sceptre and informed by the Prussian spirit." Mr. Fisher's lecture on Imperial Administration contains various statements open to criticism. The Civil Service of India has never been irresponsible. Admitting that there has been no "popularly constituted" body in India to exercise interference, the Service has always been responsible to law in all its branches, as administered by the Courts of Justice. Nor has it ever been correct to say that "in reality the last word lies with Indian official opinion, in the sense that a measure would not be forced upon India against the united opposition of the Indian bureaucracy." Since the lecture was delivered in 1915 the Montagu-Chelmsford scheme of reforms has been passed: if the Civilians could have voted by ballot, they would certainly have opposed them by a large majority. Nor is the Indian Civil Service "the Government," nor is it "master in its own house." Its members are the officers of a Government and have to obey orders. Mr. Fisher mentions some public "demands" (for appointments held by the Civil Service), and contentions, as if they were necessarily to be conceded because demanded. He does not know, or ignores, the fact that one principal aim of the agitators is not only to acquire power, but to seize the "loaves and fishes" in the shape of the higher appointments. In referring to the cry for the separation of the executive and judicial functions, he confuses the judge and the magistrate of a district. There has been no complaint of a *judge* having an administrative bias. For good reasons

it has been decided that the magistrate should be vested with certain judicial powers, and with authority over the police, for he is responsible for law and order, the suppression of crime, and the supervision of the subordinate magistracy. The concentration of authority in the District Officer is the pivot of Indian administration. On the alleged costliness, the desirable efficiency of the Indian services, and other points made by Mr. Fisher, it would be necessary to write at greater length than is possible in a brief note. This collection of essays is so attractive that it can bear the criticisms on the paper last mentioned.

C. E. Buckland.

THE STUDY OF ROMAN LAW TO-DAY.

The inaugural lecture[1] of Professor de Zulueta, who is Dr. Goudy's successor in the Regius Chair of Civil Law at Oxford, contains a critical account of recent research work in Roman Law with an indication of its future tendencies. Written by one of the very few persons in England who follow closely the literature of the subject, it is a most useful survey of the way in which it is being studied at present. One learns from it more particularly how Roman Law is being treated in Germany, France and other Continental countries. To Germany, at least in the nineteenth century, Professor de Zulueta assigns the leadership in the study as unquestionably belonging; but both in the text and in the footnotes of his lecture he bears ample testimony to the value of the contributions made to it in recent times by leading French, Italian and other jurists, such as Gerard, Duquesne, Huvelin and Riccobono. In respect of this country Professor Buckland's special studies on Roman law are of course referred to in the lecture; use also is made in it of the writings of Professor Vinogradoff on questions of a general kind. At the outset it recognises that the work of Mommsen, Krueger and their school in settling the text of the courses has not been seriously modified by recent investigation. What is called the despotism of the Florentine MSS. of the Digest, which Mommsen established and which has been the basis of all modern work, generally continues unshaken, and Krueger's edition of the code still holds the field. More weight has been recently claimed for some MSS. than Mommsen was prepared to allow, and mistakes that he attributed to copyists are now thought to be those of the compilers, and so should not be removed from the text. But generally there is comparatively little of importance to report in this field of enquiry. Research has been more occupied in considering historical questions which arise out of the text than the text itself. The direction of the study of Roman law, the lecture notices, is now, like that of other studies historical, a direction which it has been taking since the time when Savigny wrote. Full scope for this method

[1] Inaugural lecture delivered May 12th, 1920, before the University of Oxford, by F. de Zulueta, Regius Professor of Civil Law.

of treatment has been given by the establishment of modern codes, and especially of the German code, in countries where Roman law was previously in force. Hence there is no longer any inducement (except in outlying parts of the world, such as South Africa, where Roman law modified by custom and otherwise is still in force) to interpret texts in such a way as to make them conform with traditional usage and practical requirements. Thus, considering the study of his subject to be an international one, and its conditions to be determined by its existing circumstances, Professor de Zulueta is able to say that:

> Our interest in the Corpus Juris consists in recovering from the harmonising text of the compilers dogmatic differences between every age and every jurist, in underlining those discrepancies of thought, expression and decision which, so long as the Corpus Juris was considered simply as a Code, it was our object to suppress and explain away.

But while he shows, following the bent of current literature, how a Romanist of the present day should study his subject, he is careful to warn law-teachers against the danger of allowing "the immense interest in the search for the half-buried classical law to make them forget the more urgent task of systematic exposition of the law of Justinian." For, apart from its educational value in itself, he regards such systematic treatment of the subject as a necessary step to the knowledge of both earlier and subsequent law. It is, however, with the search which is going on for this "half-buried classical law" and with other historical problems that the lecture is principally concerned; accordingly, it informs us that in the literature of the last five or six years two methods have been mainly employed by Romanists: (1) the application of comparative law (by which is meant the parallel evolution of law) to the origins of Roman law, and (2) the interpolation question. The parallel evolution of Roman and other bodies of law is a subject with which we were first made familiar in England by interesting speculations of Sir Henry Maine, in his *Ancient Law*. Since then there has been much detailed work on the subject. For recent times Professor de Zulueta draws attention to an article by the late Professor Binding, published at the end of 1919, in which he compares the Twelve Table system of wrongs to the person with the Germanic, to Huvelin's work on the sources of the law of Furtum, and to a dissertation by Lenel on the comparative law of succession. Mr. Ward Fowler's study of *confarretio* is also referred to. But the greater part of the lecture is taken up with an examination of the interpolation question, a question which, as it is more investigated, increases in complexity. "Even the most cautious," we are told, "allow that the changes made by the compilers are far more numerous and thorough-going than was suspected forty years ago; old tests have been greatly developed and new tests discovered." Interpolations, according to the lecturer, are principally due, either to the classical law which the compilers adopted having been previously corrupted, or to intentional alterations of the classical text inserted for legislative reasons. Corruption of those texts of classical law, lying outside

Justinian's compilation, that have come down to us seems in some cases to be established. Kniep even goes so far as to maintain, in connection with his new edition of the *Institutes* of Gaius, that the text we have of it is an interpolated one—an hypothesis which has not much to support it. We may, however, suppose that a considerable number of the very numerous texts of classical law which reached the hands of the compilers were not in their original state, and that a portion of these were incorporated in Justinian's codification as they stood. It has, it appears, been a main object of recent criticism to discover such texts and to show how the classical law in them originally stood, a task of no little difficulty. In respect of interpolations which were intentionally made by the compilers for legislative purposes, much also has been done in recent years to make more of them known. The amount of this kind of legislation which was necessary in order to adapt the classical law to the changed condition of Roman law in the time of Justinian was of course very considerable. Professor de Zulueta's remarks on the subject of such Tribonianisms, as indeed on the interpolation question generally, are of great interest and require careful consideration. In conclusion, we would express the hope that the review which he has given in the present lecture of the literature of his subject may be continued in future years.

E. A. Whittuck.

AN INTERNATIONAL COMBINE.

Ten years ago Mr. Paul Reinsch published the first edition of *Public International Unions, their Work and Organisation*, which is a useful account of the international organisations established by general conventions. The time is opportune, however, for a fuller work which has now been supplied by Mr. Stephen Haley Allen in *International Relations*, issued from the Princeton University Press (5$). The value of his survey is that he has placed the formation of these unions in an historical perspective. The postal service was the subject of one of the earliest international conventions developed from a series of international agreements dating as far back as the year 1817. The development of the means of transit has facilitated the intercourse of nations to a considerable extent during the last fifty years. Mr. Allen classes the various international conventions into groups dealing with the general welfare of the communities and the common property of all nations, to which he adds sections describing the Hague Conferences and the League of Nations. Thus it is seen that the organisation of the League of Nations has a practical aspect, instead of being another attempt to give form to a chimæra, which has appealed to men in different periods in the history of the world.

Dissipating the cloud of political and nebulous ideas which surround the Palais des Nations, the historical observer may discern the General Secretariat to the League as a businesslike development from the numerous international organisations formed in the last fifty years. The

business man, whether in the United States, the British Empire, or Germany, sees the advantage of unifying and consolidating his activities, with the result that since the Armistice, a process of commercial development, which had been noticeable before the war, has made a rapid advance. Precisely the same movement is finding expression in the world of international affairs. It may not be expedient or desirable at present to move the International Institute of Agriculture from Rome, or similar bodies elsewhere, to Geneva, but a close liaison with a common centre is likely to be a valuable aid to the furtherance of their respective activities. The great difference between these combinations of international organisations and those which take place in the business world, is that the former are for the benefit of humanity, while the latter are devoted to the furtherance of particular interests. It is a happy augury that the first international bodies to take a fresh lease of life under the new auspices are those dealing with the conditions of labour and the health of the world.

Mr. Allen's book gives the legal basis upon which all these organisations are established, together with the text of the documents including the Peace Treaty, so that it is a comprehensive text-book, useful to anyone who desires to take an intelligent interest in the recent developments of international relations.

C. E. A. B.

THE MAKING OF WALES.

A GREAT deal of the matter contained in Mr. Llewellyn Williams's interesting little volume [1] raises questions of such importance from the standpoint of comparative law that it would not be possible to discuss them adequately, or indeed intelligibly, within the compass of a review. It is proposed, therefore, to return to the subject at greater length upon another occasion.

The learned Recorder of Cardiff has placed historical students under a deep sense of gratitude to him by the publication of these studies. For some reason books upon Welsh history are " worse sellers " even than those upon Irish history. More than that, the subject itself has not proved attractive to historical workers, with a few brilliant exceptions. Yet the persistence within the historical boundaries of England of a small people, alien in culture, alien in language, and for a lengthy period alien in law, presents problems of great value.

Part of this neglect has been due to the fact that the subject has often been approached from the wrong angle. Native writers, filled with an exaggerated spirit of " nationalism," have sought to find an orderly development of Welsh institutions, which does not exist ; and have considered it an offence to their proper pride to acknowledge that the conquest of Wales is the central fact in Welsh history. For similar reasons

[1] *The Making of Modern Wales.* By W. Llewellyn Williams, B.C.L., K.C. London : Macmillan & Co., Ltd. 1919. Cr. 8vo. viii and 336 pp. 6s. net.

other striking features, such as the fact that Wales has not, and never had a capital, are placed in the background, instead of being properly explained.

The most original of the studies in this volume are undoubtedly those upon the ancient courts; but this subject it is proposed to reserve for fuller discussion. Equally suggestive, and we think equally sound, is the author's treatment of the Tudor Policy. Doubtless their Cymric ancestry made an understanding between the Tudor sovereigns and their Welsh subjects easier than in the case of the Plantagenets, but, nevertheless, the beneficial effects of Henry VIII's legislation are remarkable. Mr. Williams calls that legislation the "grant of a constitution," and upon the whole makes out a strong case for his contention. Equally interesting in their way are the chapters upon the Roman Catholics, Nonconformity, and the Welsh language; but they hardly fall within the ambit of this Journal.

H. J. R.

PROFESSOR LAMMASCH ON THE LEAGUE OF NATIONS.

Will the League of Nations—as laid down in the Treaty of Versailles—form the basis upon which peaceful relations between the peoples will rest, and the future development of the world's organisation be secured? Or will it lead to disappointment again, and the nations sink back into a morass of physical and moral murder? These were the questions formulated by the late Professor Lammasch in a work [1] which was ready for the Press when death overtook him on January 6, 1920.

The Treaty of Versailles did not satisfy him, but far from rejecting it, he carefully studied its shortcomings, in order to show how it might be improved. He extended his welcome to it.

The great obstacle to a Bond of Nations has always been the Sovereignty of each individual nation, and the adage that a nation is the highest development of the human community. Thus, the earlier endeavours for a world peace aimed at the establishment of a world-empire, crushing the sovereignty of individual states. In modern times the administrative unions have taught the world that a higher development of co-operation between nations is possible, and that the meaning of sovereignty in reality amounts to independence of a stranger's will, not independence of a legal organisation. The realisation of solidarity between nations alone will be able to give security for eliminating any danger of war.

The author reviews the difficulties of Peace evolution, emphasised for a long time by the scholastic idea of a "just" war, and then devotes the major part of his work to the means for preserving peace between nations, viz.: mediation, arbitration, and an international Court of

[1] Dr. Heinrich Lammasch, *Völkermord oder Völkerbund?* Haag, Martinus Nyhoff, 1920. 2 gld.

Justice as finally constituted according to the provisions of the Treaty of Versailles. Regarding the latter, Lammasch confesses to have changed his opinion as to a sanction of decisions given by an International Court of Justice, and declares his latest conviction that the moral authority of these judgments will not be sufficient, but will need a backing of material force.

Finally, in reaching his answer to the above-mentioned questions, Lammasch criticises the articles of the Treaty of Versailles, which constitute the League of Nations, and discusses the preventive activity and, subsequently, the constructive activity of such a League. A real development can only be expected when, through education and intellectual development, international intercourse becomes a matter of " mind and heart " of the world citizens and leads to a spiritual bond of nationalities.

The final words of this great international jurist sound as a pathetic farewell to the world, where so much disappointment has met him in his closing days. He exhorts all living persons to lay the foundations of Peace in their hearts, and so to turn a treaty which statesmen have construed in cool deliberation into a living bond of nations, palpitating with the warmth and fullness of life.

W. R. Bisschop

PROBLEMS OF IMPERIAL GOVERNMENT.

Mr. H. Duncan Hall has written a text-book [1] containing the information necessary to anyone who desires to possess a right understanding of the problem presented in the relationship between the Dominions and the United Kingdom, and of each to the League of Nations. He deals with the subject historically, and then investigates the various aspects of the problem as it faces us to-day, besides suggesting the general lines along which the British Commonwealth should develop in the future. In a later issue of the Journal, Sir Hibbert Tupper will deal with some aspects of Mr. Hall's book, so on the present occasion it is sufficient to direct attention to his estimate of " the pooling of legislative, administrative, and judicial experience " as being one of the greatest needs of the British Commonwealth.

" There are," he writes, " in this Society of States, a vast number of legislatures, administrative departments, and courts, all occupied with much the same problems. It is obvious that this work would be considerably lightened, that much time might be saved and many mistakes avoided, if they had some effective means of pooling all the knowledge and experience gained by each legislature, administrative department, and court, so that this would be shared by all the others. . . .What the situation seems to demand, therefore, is the creation of a Joint Imperial Legal Information Bureau to do the kind of work now done by the Society of Comparative Legislation, but on a much more extensive scale."

Evidence in support of Mr. Hall's contention is supplied in the report

[1] *The British Commonwealth of Nations* (London, Methuen & Co.).

of the Ninth Congress of the Chambers of Commerce of the British Empire, where testimony was borne to the practical value from the point of view of the business man of the work of the Society in working towards uniformity of legislation throughout the Empire.

We have also received the following:

Prices and Price-control in Great Britain and the United States during the World War. By Simon Litman. (New York, Oxford University Press, 1920.)

A Manual of the Public Benefactions of Andrew Carnegie. (Washington, 1919. Compiled and published by the Carnegie Endowment for International Peace.)

Die Völkerrechtlichen Urkunden des Weltkrieges. (Duncker and Humblot, Munich, 1920.)

The following periodicals are also received: American Bar Association Journal; American Economic Review; American Political Science Review; Bombay Law Reports; Bulletin mensuel de la Société de Législation comparée; Bulletin de l'Institut Intermédiare internationale; Calcutta Weekly Notes; Canadian Law Times; Columbia Law Review; Contemporary Review; Edinburgh Review; L'Égypte Contemporaine; Hindustan Review; International Labour Office Bulletin; International Law Notes; International Review of Agricultural Economics; Journal du Droit International; Journal of the Parliaments of the Empire; Journal of the Royal Statistical Society; Juridical Review; Kathiawar Law Reports; Law Quarterly Review; League of Nations Journal; Madras Law Journal; Punjab Law Reports; Revue de Droit International et de Législation comparée; Revista Italiana di Sociologia; Revista de derecho jurisprudencia; Revue International de la Croix Rouge; Revista Italiana per le Scienze Guiridiche; South African Law Journal; To-day and To-morrow; U.P. Law Reports; Wisconsin Law Review.

ADOPTION OF CHILDREN IN NEW ZEALAND.

[*Contributed by* D. Stanley Smith, Esq., LL.M.]

The object of the New Zealand adoption legislation is, in general, to give to the adopted child the status of a child born in lawful wedlock to the adopting parent, and thereby to ensure that, during the lifetime of the adopting parent, the parent shall not be disturbed in the guardianship and control of the child; and that, upon the death of the adopting parent, the child shall be entitled to succeed to the property of the adopting parent. Before any statute regulating adoption was passed there had in fact been many instances where kindly disposed persons had maintained, educated and cared for a child not their own. This relationship was created by the act of the parties, and might be broken at any time if the natural parents took steps to reclaim their own child. In some cases this occurred after a strong affection had grown up between foster parent and child, and after considerable sums had been spent on the child's maintenance and education. It was stated by the Honourable Dr. Grace, a member of the Legislative Council, and a medical practitioner, in the debate in the Council upon the first Bill for the Adoption of Children, that he had frequently seen reputed parents suffer all the agonies and pain of actual parents, from the loss of a child which had been placed in their hands by some drunken and disreputable father or mother, and very often torn away from them solely for the purpose of extorting money, at an important epoch in the child's life, and he had seen great injury inflicted on children and on the State itself, as the result of this condition of things (*Hansard* [N.Z.], 1881, vol. xxxix, p. 6). In these circumstances a demand arose for an inexpensive adoption law, which would give security to the relationship between adopting parent and child, and a more effective scope for the philanthropic activities of kindly disposed people.

The law exists also for the benefit of the adopted child. An orphan or a destitute child has frequently found a better home with its adopting parent or parents than such child could have found in any other way; since the Court making the order of

adoption is charged with the duty of satisfying itself that the welfare and interests of the child will be promoted by the adoption.

These objects are fundamentally the same as those of the provisions of the Code Napoléon, and of the adoption laws of the American States; but they differ from the main object of adoption under the Roman law, which was, of course, to provide childless persons with an heir.

Legislation.—The first adoption statute was The Adoption of Children Act passed in the year 1881, and was the result of a private member's bill introduced into the Legislative Council. This statute laid down the lines upon which the adoption of children has since proceeded, though additional safeguards against the abuse of the adoption process have been subsequently provided. Under this statute the jurisdiction in adoption matters was confined to the District Court, which ranked in importance midway between the Magistrates' Court and the Supreme Court. In 1885 an amending Act was passed, giving the Magistrates' Court a co-ordinate jurisdiction in adoption, and it was a matter for the party making the application for adoption to decide in which Court he should proceed. (The Districts were abolished in the year 1909, and the District Courts then ceased to exist.)

The Act of 1881 was in so clumsy a form that it was felt desirable to simplify it. This was done in 1895, when a statute was passed repealing the previous Acts and enacting the law in a simple fashion. Certain amendments were also made:

(1) The Act of 1881 limited adoption to children under the age of twelve years; the Act of 1895 increased the age to fifteen, but provided that the judge, before making an Order of Adoption, must be satisfied that the child, if over the age of twelve, consented to the adoption.

(2) The Act of 1881 provided for an application to adopt being made only: (*a*) by a married person, or by a person of the same sex as the child proposed to be adopted, the applicant to be at least eighteen years older than the child; or (*b*) by any person at least forty years older than the child to be adopted.

The Act of 1895 omitted age restrictions for married applicants.

(3) The Act of 1881 limited the time within which an Adoption Order might be reversed or discharged to three months after the making of the order. The latter Act omitted the time limit.

Further amendments were made in the year 1906. The Adoption of Children Amendment Act of that year provided that an

adopting parent should not receive a premium in respect of the adoption, except with the consent of a magistrate. This was directed against the abuse of the adoption procedure, whereby it was used in a few cases, partly as an aid to a livelihood.

Ss. 2 and 3 of the Statute Law Amendment Act of 1906 also dealt with the Law of Adoption. (This statute was passed to give effect to the recommendations of the Commissioners engaged upon the work of consolidating the New Zealand Statutes.) S. 2 of that Act provided that the Adoption of Children Act should not affect the marriage law, and s. 3 provided that, upon the discharge of an Adoption Order, the rights and responsibilities of the natural parent should revive subject to the conditions (if any) stated in the discharging order.

By s. 21 of "The Infant Life Protection Act of 1907" a further amendment was made by providing that where the magistrate was satisfied that the parent or guardian was for any reason unfit to have the custody or control of the child the magistrate might, in making the Adoption Order, dispense with the consent of the parent or guardian. The parent or guardian affected was at the same time given a right of appeal to the Supreme Court.

The Statutory Law of Adoption was then established, as it stands to-day in Part III of "The Infants' Act, 1908" (New Zealand Consolidated Statutes), and as it has been explained in this article.

Kinds of Adoption.—In New Zealand there are two kinds of adoption: firstly, adoption of children by private individuals; and, secondly, adoption of deserted children by the managers of benevolent institutions. It is proposed to consider, in the first place, the adoption of children by private individuals and to inquire:

(*a*) What children may be adopted; (*b*) who may adopt them; (*c*) what is the procedure to be followed; and (*d*) what is the effect of an Order of Adoption.

(*a*) **What Children may be adopted.**—Any child, male or female, under the age of fifteen years may be adopted. If the child is under the age of twelve years, its consent to the adoption is not required; but, otherwise, the child's consent is a condition precedent to the making of an Order of Adoption. (S. 18 [1] (*d*]).

(*b*) **Who may adopt Children.**—An adopting parent is defined (s. 15) as any person who is, by an Order of Adoption, authorised to adopt a child, and, in the case of an Order being made in favour of a husband and wife on their joint application, means both husband

and wife. The statute specifies in detail the persons who may adopt children.

S. 16 provides that a *female* child may be adopted (1) by husband and wife jointly; or (2) by a married woman alone, but with the written consent of her husband; and (3) by any unmarried woman who, in the opinion of the judge, is at least eighteen years older than the child, or (4) by any unmarried man who, in the opinion of the judge, is at least forty years older than the child. S. 17 provides that a *male* child may be adopted (1) by a husband and wife jointly; or (2) by a married man alone, but with the written consent of his wife; or (3) by any unmarried man who, in the opinion of the judge, is at least eighteen years older than the child; or (4) by any unmarried woman who, in the opinion of the judge, is at least forty years older than the child.

S. 19 provides that, except by husband and wife, no child shall be adopted by more than one person.

These restrictions are in the nature of moral safeguards. They were suggested partly by the provisions of the Code Napoléon, relating to the adoption of children, and partly by the provisions of the Adoption Laws of the States of New York and Massachusetts, though they are not identical with any such. The definition of "adopting parent" given above was taken from the Act of 1895, which varied the definition given in the Act of 1881. Under the definition in the earlier Act, "adopting parent" meant any person who was, by an Order of Adoption made as therein provided, authorised to adopt a child; and, if such person were married, included the person to whom such adopting parent was married. This phrasing had an important result in the case of *Rex* v. *Stanley* (23 N.Z.L.R. 378 and 1100.) In that case the prisoner's wife had adopted a child with the prisoner's consent under the provisions of the Act of 1881. The prisoner had connection with this adopted child on two occasions, whilst the child was under sixteen years of age. He was charged with incest, and the only defence was that the child was an adopted child. The Court of Appeal held that the result of the interpretation put by the second section of the Act of 1881 upon the words "adopting parent" was that the prisoner, through his marriage to the actual adopting parent, was himself an adopting parent, and that therefore the relationship of parent and child had been established between him and the child for all purposes both civil and criminal, and that accordingly he was guilty of the crime charged. The present definition of "adopting

parent" has apparently altered the law in this respect. Under the Act of 1908, where an Adoption Order is made upon the application of a married woman with the consent of her husband, no relationship is established between the husband and the child adopted. As was said by the Court in the case cited, it may be doubted whether the consequences of this alteration in the law were contemplated by the Legislature. The matter does not seem to be of practical importance, as the provisions of the Crimes Act relating to rape and indecent assault should be sufficient to cover any such case. It is rare to find instances where adopted children are improperly treated.

Procedure.—The first step in the proceedings is an application in writing (in the form specified in the rules made under the statute) to the stipendiary magistrate by the person or persons applying to adopt the child. In accordance with a recently gazetted rule this application must now be accompanied by the child's birth certificate, the object being to ensure that the child can be accurately identified by the Registrar of Births, Deaths and Marriages. The consents of all necessary parties must also be filed in the Court along with the application. These parties are as follows: 1. The child itself, if over the age of twelve years. 2. The parents of the child, whether living in or out of New Zealand; or such one of them as is living at the date of the application. If one parent has deserted the child, the consent of the other only is required, but the fact of desertion must be proved. 3. The legal guardian of the child in cases where both parents are dead. The consent of the legal guardian is in these cases imperative, and the Supreme Court will, if necessary, appoint a guardian for an orphan to enable the proper consent to be filed (*in re* Nash 2, N.Z.S.C. 286, and *in re* Athey 11, G.L.R. 480).

It will be seen that the basis of the New Zealand procedure is the consent of all interested parties. If, however, the consent of a parent or guardian were unreasonably withheld, it is plain that an adoption in the interests of the child might be prevented. Accordingly, by an amendment of the Act made in 1907, the magistrate was granted a dispensing power. If he is satisfied that any parent or guardian is for any reason unfit to have the custody or control of the child, and that notice of the application for the Order of Adoption has been given to such parent or guardian, the magistrate may, if he thinks fit, in making the Order of Adoption, dispense with the consent of the parent or guardian. A right of appeal is given; and the aggrieved parent or guardian may, within one month after the

making of the Adoption Order, apply to a judge of the Supreme Court, on notice to the adopting parent or parents, to discharge the Order of Adoption, and the judge may, in his discretion, discharge such Order upon such terms as he thinks fit. This is the only case in which there is an appeal from the magistrate's decision in adoption proceedings.

Apart from the consents, there are certain other matters upon which a magistrate is required to be satisfied before he may make an Adoption Order. These are:

1. That the child is under the age of fifteen years.

2. That the adopting parent is of good repute, and is a fit and proper person to have the care and custody of the child proposed to be adopted. The words "of good repute" were not in the original bill when first submitted to the Legislative Council in 1881. By that bill an adopting parent was required to be a "respectable" person; but that word did not satisfy one vigorous colonial legislator, who so heaped Carlylean scorn upon the word that the Attorney-General was glad to pacify him with the well-known legal phrase. Evidence of good repute is usually given by the affidavit of a clergyman or other well-known resident who is acquainted with the party making the application for adoption.

3. That the adopting parent is of sufficient ability to bring up, maintain and educate the child. The evidence under this heading is given by the affidavit of the adopting parent specifying his occupation, his income per annum, the size of his house and the locality, the size of his family and their circumstances, and the number of his dependants.

4. That no premium or other consideration for the adoption is being paid to the adopting parents without the consent of the magistrate. If a premium is to be paid, the amount thereof, the person paying it, and the necessity or other circumstances out of which the premium arises must be fully explained to the magistrate, and he must consent thereto before an Adoption Order can be made.

In cases where an infant under the age of six years is adopted, and the adopting parents receive a consideration or reward in connection with the adoption, the provisions of Part V of "The Infants' Act, 1908," relating to Infants' Homes apply (*Curtis and Anor.* v. *Johnson*, 11, G.L.R. 110), and in such case the adopting parent must apply to the Secretary of the Education Department for a licence to act as a foster parent; but the Minister of Education may, if he thinks fit, exempt the adopting parent from the require-

ments of Part V of " The Infants' Act, 1908 " ; and this is the course usually adopted.

5. That the welfare and interests of the child will be promoted by the adoption.

The magistrate must be satisfied that this is the conclusion to be drawn from all of the facts placed before him.[1]

Upon the making of an Order of Adoption, the Clerk of the Court in which the Order is made is required by s. 8 of " The Births and Deaths Registration Amendment Act, 1915," to furnish the Registrar-General of Births, Deaths and Marriages with full particulars of the Order. If the child's birth has been registered in New Zealand a note of the Adoption Order is made upon the Register; but, in any case, a new entry is made on the prescribed form in the Register of Births.

Effect of an Order of Adoption.—The relevant section is s. 21 of Part III of " The Infants' Act, 1908," consolidating ss. 7, 8 and 12 of the " Adoption of Children Act, 1895," ss. 7 and 8 themselves having but re-enacted the provisions of ss. 5 and 6 of the first " Adoption of Children Act " in 1881. The purport of s. 21 may be summarised as follows :

1. The first effect of an Order of Adoption is that it confers the name of the adopting parent on the adopted child, in addition to the proper name of the child—*e.g.* if the child's name is " Thomas Robinson," and he is adopted by " John William Brown," the child's name will become, upon the making of an Adoption Order " Thomas Robinson Brown."

2. The second effect relates to the status of the adopted child, and it may be stated from three points of view : (1) that of the child; (2) that of the adopting parent, and (3) that of the natural parents.

(1) S. 21 (1) provides :

> The adopted child shall for all purposes, civil and criminal, and as regards all legal and equitable liabilities, rights, benefits, privileges and consequences of the natural relation of parent and child, be deemed in law to be the child born in lawful wedlock of the adopting parent ;
>
> Provided that such adopted child shall not by such adoption :
>
> (*a*) Acquire any right, title or interest in any property which would devolve on any child of the adopting parent by virtue of any deed, will or

[1] Before the application is heard, the adoption papers are handed to the local Police Force for inquiry and report, and the statements contained in the various affidavits are in this way verified for the magistrate by a body representing the interests of the community.

instrument prior to the date of such order of adoption, unless it is expressly so stated in such deed, will or instrument ; nor

(*b*) Be entitled to take property expressly limited to the heirs of the body of the adopting parent, nor property from the lineal or collateral kindred of such parent by right of representation ; nor

(*c*) Acquire any property vested or to become vested in any child of lawful wedlock of the adopting parent in the case of the intestacy of such last-mentioned child, or otherwise than directly through such adopting parent.

(2) S. 21 (2) provides that the adopting parent shall for all purposes both civil and criminal or otherwise be deemed in law to be the parent of such adopted child, and be subject to all liabilities affecting such child as if such child had been born of such adopting parents in lawful wedlock.

(3) S. 21 (2) further provides that the Order of Adoption shall thereby terminate all the rights and legal responsibilities and interests existing between the child and its natural parents, except the right of the child to take property as heir or next-of-kin to his natural parents, directly or by right of representation.

Two cases have been decided on the effect of an Order of Adoption, viz. *in re* Carter (1905) 23 N.Z.L.R. 278, and *in re* Goldsmid, 1916, N.Z.L.R. 1124). In *in re* Carter a married woman who had a son of her own by a former marriage adopted, with the consent of her husband, the illegitimate son of another woman, under the provisions of the Act of 1881, which contained provisions relating to the effect of an Adoption Order in the same terms as those of the Act of 1908. The adopting parent and her husband both died, and the adopted son died intestate. The question then arose whether the mother of the adopted son was entitled to succeed to his property (as the mother of an illegitimate child was entitled to do under s. 35 of " The Administration Act, 1879 "), or whether the son of the adopting parent's first marriage was entitled to obtain it. The Chief Justice pointed out that if the legitimate son of the adopting parent had died intestate after his mother's death, and had left property, the adopted son would not, because of the exception (*c*) set out above, have been entitled to any of the deceased son's property, and that if the legitimate son were entitled to any of the adopted son's property there was a want of reciprocity. He pointed out, however, that there was also a want of reciprocity as affecting the natural parents, for by s. 6 the adopted child can succeed to the property of his natural parents as heir or next-of-kin, directly or by

right of representation, whilst he can also succeed to the property of his adopted parent; and, on the other hand, there is no express provision that the natural parents can succeed to the property of the adopted child. The Chief Justice proceeded:

> The question really turns on what is to be the meaning of the words in s. 5, which express the status of the child. The words are, as already cited, "that for all purposes, civil and criminal, and for all advantages and benefits, and other legal consequences of the natural relation of parent and child, the adopted child shall be deemed to have been born in lawful wedlock."
>
> I am of opinion that I must give effect to these words, except where they have been cut down by the provisos or by any other clause in the statute. Now, none of the four provisos in s. 5 cuts down these general words so as to deny to a child born in lawful wedlock the right to succeed to the property of an adopted child, who in law is deemed to be also a child born in lawful wedlock of its adopting parents. So far as s. 6 is concerned, the adopting parent becomes the parent of the adopted child, and the Order of Adoption, it is said, terminates all the rights and legal responsibilities and incidents existing between the adopted child and its natural parent, except in one thing—namely, his right to succeed to the property of his natural parents. It is clear that, under this section, the natural parent has no liability to maintain the adopted child, has no control over the child, and the child is deemed to be a child born in lawful wedlock of its adopting parents.

The Chief Justice accordingly held that the legal consequences of the adoption were that the legitimate son was in law the half-brother of the adopted son, and, as such, next-of-kin of the deceased adopted son, and that the right of the deceased's mother to succeed to his property had been terminated. This decision was approved by Edwards, J., in *in re* Goldsmid (1916, N.Z.L.R. 1124.) At p. 1125 the learned judge said:

> I agree with the opinion expressed by His Honour the Chief Justice in *in re* Carter, that under ss. 5 and 6 of "The Adoption of Children Act, 1881," the rights of parents by adoption under that Act, and of those who claim through them, prevail over the rights of the natural parents of the children adopted, and of those who claim through them; but I think that this depends more upon the provisions of s. 6 than upon those of s. 5.

And again at p. 1126:

> In my opinion, therefore, it is clear that parents by adoption under the Act, and those claiming under them, have the same rights in the

property of children adopted under the Act as the natural parents of children born in lawful wedlock have with reference to the property of such children.

The extent to which a New Zealand adoption order is entitled to international recognition does not seem to have come up for decision by the Courts. According to Dicey, *Conflict of Laws*, 2nd ed. (Rule 125) the law of England will not in England allow any status (such, for example, as relationship arising from adoption) which is unknown to English law, to have legal effects as regards transactions in England; but (Rule 126) any status existing under the law of a person's domicile is recognised by the Court as regards all transactions taking place wholly within the country where he is domiciled. A different question arises where the effect of a foreign Adoption Order is to be considered in New Zealand, since adoption is recognised by the law of New Zealand. It is submitted that Dicey's Rule 127 will apply, and that the New Zealand Court will recognise an Adoption Order made in accordance with the law of an adopting parent's domicile; but such recognition will not necessarily involve the giving effect to the results of such status. Thus, the extent of the adopting parent's authority over the adopted child will be governed wholly by the law of New Zealand. If, by the law of the domicile, the authority of the father was much more extensive and arbitrary than in New Zealand, it cannot be supposed that the father would be permitted to transgress the power which the law of New Zealand allows. (*Johnstone* v. *Beattie* [1843] 10 Cl. & F. 42, 114, and Dicey's Rule, 131.)

The extent to which an Adoption Order can confer the nationality of a parent upon the adopted child arose in the case of *Masemann* v. *Masemann* (1917, N.Z.L.R. 769). In that case an Adoption Order, assumed to have been properly made in Germany in accordance with German law, was used as an argument that the adopted child became a naturalised British subject by virtue of the naturalisation of his adopting parent in New Zealand, and through the operation of s. 12 of "The Aliens Act, 1908" (N.Z.), which provides that when a man has become naturalised in New Zealand every child of his who, during minority, becomes resident with him in New Zealand shall be deemed to be himself naturalised. Chapman, J., held, however, that s. 12 does not extend to parentage other than natural parentage, and that s. 21 of "The Infants' Act" (N.Z.) defining the status of an adopted child applies only to an adoption made in New Zealand by

force of that statute. He held consequently that a child adopted abroad could not claim the benefit of s. 12 of "The Aliens Act, 1908," and that, whatever the international respect to be accorded to a foreign adoption might be, it could not bring an adopted child within statutory benefits limited to the natural relationship of parent and child.

Variation or Annulment of Order.—An Adoption Order may be varied, reversed or discharged by the magistrate exercising jurisdiction within the district where any Order of Adoption has been made, upon such terms and conditions as he thinks fit. S. 22 provides that, where the Order of Adoption is discharged, then, subject to the conditions, if any, of the Order of Discharge, the child and its natural parents shall be deemed for all purposes to be restored to the same position, *inter se*, as existed immediately before the Order of Adoption was made; but so that such restoration shall not affect anything lawfully done whilst the Order of Adoption was in force.

Since the consent of all interested parties is in general a condition precedent to the making of an Order of Adoption, an Adoption Order is rarely varied, reversed or discharged. It is somewhat surprising to find that an Order conferring such a completely changed status upon a child may be varied, reversed or discharged at the discretion of the magistrate. No doubt the magistrate would hesitate to vary or discharge an Order, particularly where any length of time had elapsed since the making of it. Nevertheless, there is no right of appeal from the magistrate's exercise of his discretion, and it is possible that in this direction difficulties may arise in the future.

With respect to the effect of an Order it remains to notice that s. 26 provides that nothing in the Act shall be construed to authorise any marriage that could not lawfully have been contracted if the statute had not been passed. Apart from this provision, it is plain that an adopted child, after acquiring its new status as the child of the adopting parents, might marry its own natural brother or sister.

II. Adoption of deserted children by any benevolent institution or any other institution, established in connection with any religious denomination, and not maintained by Government subsidy (s. 24 of the Act).

A deserted child is defined in s. 15 as meaning any child who, in the opinion of the magistrate, is deserted, and has ceased to be cared for and maintained by its parents, or by such one of them as is living, or by the guardian of such child; or by the mother of such

child, if the child is illegitimate. A deserted child may, of course, be adopted like any other child; but it is only a deserted child which may be adopted by the manager of a benevolent or religious institution.

Application is made in respect of any such child by the manager for the time being of the institution averring that he is desirous of adopting such child in connection with such institution. Proof must be given (*a*) that the child is deserted, (*b*) that the child is of the same religious denomination as that of the institution whose manager makes the application, and (*c*) that such institution is properly conducted, and is capable of properly bringing up such child. On being satisfied of these matters, the magistrate may make an Order, authorising the manager for the time being of the institution to adopt such child in connection with the institution. Under such an Order the child retains his or her own name, and in no manner inherits or succeeds to any property of the manager or of the institution. The institution may receive a premium or reward in respect of the adoption without the consent of the judge. In practice, the institutions, which are mostly the orphanages and social service organisations established by the various religious denominations, trace the deserting parent, and oblige him or her (by legal process if necessary) to contribute to the support of such parent's child when adopted by the institution.

S. 21 relating to status does not apply to such adoptions, except as to the determination of all rights of the child's natural parents, and except as to the right of the child to take property as heir or next-of-kin of his natural parents, directly or by right of representation.

Such an Adoption Order entitles the child to the support, maintenance, and advancement afforded by such institution; and all such other rights, benefits and privileges and advantages appertaining thereto, all of which it is the duty of the person or body managing or controlling the institution to provide.

Adoption from the Standpoint of Social Welfare.—At the request of the writer of this article, the following note upon Adoption as an Instrument of Social Welfare has been kindly supplied by W. G. Riddell, Esq., the senior magistrate exercising jurisdiction in the city of Wellington, who writes from a large experience.

In estimating the social effect of adoption, one has to consider that fully 95 per cent. of the orders made apply to illegitimate children. The

adopting parents may have come into contact with the infant through the means of an advertisement, or from inquiries at a Receiving Home or Salvation Army Home, or by reason of the fact that the mother is known to one or both. The adopting parents are, in many cases, childless, and by adopting an infant both parties concerned are benefited, and the State relieved from the possible burden of maintaining the infant, until such time as he or she becomes self-supporting. In the case of an illegitimate child, further benefits lie in conferring a name upon the infant, and in securing for it a continuous home life. The adopted infant is assured of an environment equal to that of an ordinary legitimate child, and under these conditions has every chance of developing into a useful citizen. On the other hand, the adopting parents secure a child, which is regarded in the same light as their natural offspring. The want in their lives is supplied, and the added responsibility taken up by them has its own reward. The fact that very few orders of adoption are rescinded goes to show that sufficient care is taken to satisfy the authorities that the proposed parents are suitable persons, and capable of maintaining, educating and bringing up the child which they have elected to call their own. Speaking from my experience as a magistrate exercising jurisdiction in the capital city of New Zealand, I can say with confidence that the system of adoption practised in New Zealand has been a success from every point of view. There is no doubt about its benefits, both to the infant adopted and the adopting parents, while the State gains in this way, that the burden of maintaining destitute persons is lightened, and its liability to care for and educate the unfortunate child is lessened through the aid of private persons.

It is agreed by all who are associated with the maintenance, care and guidance of destitute children that the conditions and training found in Receiving Homes (*i.e.* Foster Homes licensed by the Education Department), although excellent in many ways, fall short of those found in decent private family life, and the institution of adoption supplies the means by which the best results can be attained, and all parties interested benefited.

THE CONSTITUTION OF THE PHILIPPINE ISLANDS.

[*Contributed by* JOSÉ P. MELENCIO, ESQ., OF THE PHILIPPINE BAR.]

TECHNICALLY speaking, the Philippine Islands have no constitution to-day. In the sense that a Constitution is the supreme will of the people of a definite territory, as is the United States Constitution which recites, "We, the people of the United States, in order to form a more perfect union, establish justice, etc."—in this sense, the Philippine Islands to-day cannot be said to have a constitution of their own. They have not a concrete tangible document that is the expression of the popular will, framed by representatives of the people, and deriving its force from the people.

In the sense, however, that a constitution is "the fundamental or organic law of a State," it could well be said that the Filipinos now have a Constitution. But it is not of their framing. Neither is it one tangible document. It was made for them by the United States Congress, and it is embodied principally in three documents, of which each is a progressive development of the other. These documents are:

1. President McKinley's Instructions to the first Philippine Commission of April 7, 1900.

2. The Philippine Bill, or the Act of Congress of July 1, 1902.

3. The Philippine Autonomy Act, or the Act of Congress of August 29, 1916.

The Constitution did not follow the Flag.—The Constitution comprises, besides, all such Acts of the United States Congress as are expressly extended to the Philippines from time to time.

The United States Constitution does not operate *ex proprio vigore* in the Philippines. Decisions of the Supreme Court of the United States are emphatic in the declaration that the Constitution did not follow the flag into the Philippine Islands.

This doctrine, however, seems to be qualified by one or two exceptions. The thirteenth amendment of the United States Constitution prohibits slavery in the United States, and "in any place subject to their jurisdiction." The Philippines, being a place

subject to the jurisdiction of the United States, would seem to be within the scope of the operation of that amendment. The Philippine Legislature, however, has passed anti-slavery laws of its own.

Treaties entered into by the United States from time to time, and expressly applied to the Philippines, would, of course, apply to the Islands. Whether treaties not expressly made applicable apply or not to the Islands would seem to be a mooted question. It is a point not yet adjudicated upon by the Courts. As the Constitution, however, did not follow the flag, and as treaties are made by the President with the consent of the United States Senate, and as neither the Senate nor the President, but Congress alone, has, under the Constitution, the power to legislate over territories, it would seem that such treaties cannot form a part of the fundamental law of the Philippine Islands.

The same principles hold true with regard to the statutory laws of the United States. These laws do not apply to the Philippine Islands, except when they specifically so provide. Laws of war, however, and those enacted for the protection of the Army have been held to apply to the Philippines, even though they do not expressly so provide, for the reason that the Army is an agency of national sovereignty.

The Autonomy Act.—Of the three documents comprising the constitution of the Philippine Islands, the Jones Law, or the Philippine Autonomy Act, approaches more nearly a Constitution for the Islands, not only in phraseology, but also in structure. All three, however, have provided for the islands a framework of government, a bill of rights, and certain express powers and inhibitions on the territorial government. The characteristic feature of all of them is, that they are of a temporary nature, evidently because of the avowed intention of the United States to relinquish sovereignty over the Philippines some day. The Act of Congress of July 1, 1902, for example, is entitled, "An Act *temporarily* to provide for the administration of the powers of self-government in the Philippine Islands, and for other purposes"; while the Act of Congress of August 29, 1916 is entitled, "An Act to declare the purpose of the people of the United States as to the *future* political status of the people of the Philippine Islands, and to provide a more autonomous government for those islands."

The Constitution of the Philippine Islands in its composite form bears a striking resemblance to the so-called flexible Constitution of England, as will subsequently appear.

By virtue of the Act of Congress, August 29, 1916, the Philippine Government to-day is practically autonomous. Broad powers have been delegated to it by the Congress of the United States. The Filipinos are placed practically in control of their local affairs. This is in keeping with the intention of the United States to grant independence to the Philippine Islands as soon as a stable Government has been established therein. In fact, the act is preparatory to the withdrawal of American sovereignty as soon as that stable Government is established.

A Responsible Government exists.—The Philippine Government as at present constituted is modelled after the Federal and State Governments of the United States. A democratic form of government exists, in the sense that there is a Government by the representatives of the people, chosen by the people. It is thus a government of laws, and not of men. The majority rules, as is the case in the United States. The principle of governmental division of powers, which is characteristic of the United States system, is maintained. The separation of powers is as complete as in every other Government founded on that principle.

Relations between the United States and the Philippines.—The governmental relationship between the United States and the Philippines is much like that maintained between England and her self-governing Dominions. Control over the Filipinos is exercised through five channels:

1. Through the Governor-General, the executive head appointed by the President of the United States.
2. Through the veto power of the Governor-General.
3. Through the veto power of the Congress of the United States.
4. Through the control of foreign relations by the United States.
5. Through the provision for appeal from the Supreme Court of the Philippine Islands to the Supreme Court of the United States in certain cases.

With the exception of the third item, substantially the same modes of control are exercised by Great Britain over the affairs of her Dominions.

Governmental Structure.—In structure the Government of the Philippines is a hybrid between the American presidential system and the English parliamentary system. In so far as compatible with the organic laws, a responsible government has been created by the Filipinos in the exercise of the autonomous powers conferred upon them. The Speaker of the House of Representatives is recog-

nised as a *premier de facto*, although he is not so *de jure*. There is a Council of State created by the Governor-General which is advisory to him. The budget system has been introduced. An intimate relation between the executive and legislative bodies exists. The two houses of the Legislature have the right to call the secretaries of the departments to testify before them. The secretaries of departments in turn are entitled to be heard by either of the two houses of the Legislature. Either house of the Legislature as well as the chairmen of the two committees on appropriation can require the attendance of officers of the Government for purposes of inquiry, investigation and the like.

Executive Power.—Just as in the British Dominions, the executive power in the Philippines is vested in an officer known as the Governor-General, who typifies American sovereignty in the Philippines, just as the Governor-General of the British Dominions typifies the sovereignty of the Crown.

The Governor-General is appointed by the President of the United States with the advice and consent of the United States Senate. He holds office at the pleasure of the President, and until his successor is chosen and qualified. He is under the direct supervision of the Secretary of War, through whom he is responsible to the President and to the American people for his acts.

While the duties imposed upon the Governor-General are not so great as those imposed upon the President of the United States, it has been said that he holds a more responsible position than those held by the State Governors.

In view of the autonomous Government enjoyed by the Filipinos, the powers of the Governor-General are now mostly supervisory. Important powers and duties, however, are conferred upon him. Among these are the following :

He has to appoint by, and with the consent of the Philippine Senate, such officers as are authorised by the organic laws, or whom he may, from time to time, be authorised by law to appoint. He is responsible for the faithful execution of the laws of the Philippine Islands, as well as those of the United States which are operative within the islands. He is granted extraordinary powers in case of rebellion or invasion, and, when the public safety requires it, he may suspend the privilege of the writ of *habeas corpus* to place the islands or any part of them under martial law. He is Commander-in-Chief of the Philippine Militia and Constabulary, and all other military forces maintained by the Philippine Government. He

has the exclusive power to grant pardons and reprieves, and to remit fines and forfeitures. He can make reservations for specific public purposes of any part of the public domain of the Philippines, the use of which is not otherwise provided for by law. He can veto any legislation enacted by the Philippine Legislature. He can exercise the right of eminent domain in behalf of the Government of the Philippine Islands. He has direct control of the Bureau of Audits, the Bureau of Civil Service and all unattached offices and branches of the Philippine Government.

In the exercise of his executive power, the Governor-General is assisted by six departments and several bureaux of the Philippine Government. These are the Department of Public Instruction, the Department of the Interior, the Department of Finance, the Department of Justice, the Department of Agriculture and Natural Resources and the Department of Commerce and Communications. Under each department are grouped various bureaux and offices. Each Department is headed by a secretary assisted by an under-secretary.

The Secretaries of Departments, together with the President of the Senate, and the Speaker of the House of Representatives, constitute the Council of State, which corresponds to the Cabinet of Canada, to the Federal Executive Council of Australia, and to the Executive Council of South Africa. The Council of State, however, is not a constitutional body, inasmuch as it was created by executive order of the last Governor-General. Succeeding Governor-Generals are not bound to recognise it. If, however, a Governor desires to form another advisory body the act would be justified because of precedent.

Legislative Power.—The legislative power in the Philippines is vested in a Philippine Legislature composed of the Senate and House of Representatives. The senators are elected for a term of six years on the basis of the population, with the exception of two for the non-Christian peoples who are appointed by the Governor-General without the consent of the Senate, and without restriction as to residence or length of office. There are twenty-four senators.

Of the ninety members of the House of Representatives, eighty-one are elected for terms of three years on the basis of population, and nine are appointed by the Governor-General to represent non-Christian peoples, Igorrotes and Moros. In thus consisting of both appointive and elective members, the Philippine Legislature bears closer resemblance to the Senate of the Union of South Africa than to any of the legislative bodies of Canada or Australia.

The Philippine Legislature has practically the same general legislative powers in the Philippine Islands as the Congress of the United States has over the United States; as the Parliaments of Canada, Australia and of South Africa have plenary authority to legislative over domestic affairs. The United States Congress, like the Imperial Parliament of Great Britain, does not generally interfere in matters of purely domestic concern. All laws, however, that are passed by the Government of the Philippine Islands are required to be reported to Congress, which reserves the power and authority to annul the same. Acts of the Philippine Legislature, therefore, are valid Acts until disapproved by Congress, or held invalid by the Courts.

The Judiciary.—The judicial power in the Philippines is vested in the Supreme Court, Courts of First Instance, Courts of Justice of the Peace, and the Municipal Court of the City of Manila. Unlike the Judges of the Federal Supreme Court of Australia, who are appointed by the British Governor-General in Council, the judges of the Supreme Court of the Philippine Islands are appointed by the President of the United States with the advice and consent of the Senate. The judges of the Court of First Instance, however, as well as the justices of the peace, are appointed by the Governor-General.

The Supreme Court of the Philippine Islands is the highest appellate Court in the Philippines. Its decisions are final except in cases:

1. In which the Constitution or any statute, treaty, title, right or privilege of the United States is involved.

2. In which the value in controversy exceeds $25,000.

3. In which the title or possession of real estate exceeding in value the sum of $25,000 is involved or brought in question.

Territorial Divisions.—The Philippine Archipelago is divided into thirty-eight provinces. These correspond to the provinces of Canada and to the States of the American Union. Each province has an elective Governor, and also an elective Provincial Board consisting of three members.

Foreign Relations.—The Philippines are a part of the United States in an international sense. Filipinos, however, are not American citizens. They are citizens of the Philippine Islands, owing allegiance to the United States, and under the protection of the United States. The islands, however, are not an incorporated territory of the United States, neither are they a sovereign or quasi-sovereign country.

THE POSITION OF THE PRIVY COUNCIL.

[*Contributed by* Sir C. Hibbert Tupper, K.C.M.G.]

It is no disgrace for a Canadian to admit that we have not enjoyed, and cannot enjoy the opportunity afforded to select such eminently trained and experienced men for the Judiciary as can be, and are, secured in England, through the division of the legal profession—a system which could never be adopted in Canada. Owing also to the fees allowed and the judicial salaries paid in England, a far greater proportion of able men are attracted there to the legal profession than in any other English-speaking country in the world.

We have, therefore, been unable in Canada to obtain for our Appellate Courts the services of the leaders of the Bars in the different Provinces of Canada. It has, under these circumstances, been fortunate for the Provinces of Canada, both before and since Confederation, that Canada has had the services of the Judicial Committee. The only reflection is, in truth, that Canada has never paid for these services. I am not aware of any serious complaint in Canada over this feature of our development of nationhood!

In so far as the Supreme Court of Canada is concerned, there was great difficulty in its establishment. Sir John Macdonald attempted to bring this about shortly after Confederation in 1867, but it was not until 1875, when he was leading the Opposition, that the Government succeeded, with his co-operation, in passing the bill.

It is significant that, while the Province of Quebec is now strongly in favour of retaining the services of the Judicial Committee (this so-called "Link of Empire"), a French-Canadian, when Minister of Justice (afterwards appointed to the Supreme Court) introduced and carried the Supreme Court Bill.

It was at that time supposed that the Supreme Court of Judicature, then about to be established in England, would involve the transfer of the jurisdiction of the Judicial Committee to that body. The Minister of Justice personally favoured the abolition of the right of appeal to the Judicial Committee. This phase of the

discussion evoked vehement opposition from Sir John Macdonald, who said it was important—

that the right of every Canadian, as well as every other British subject, to appeal to the Court of the highest jurisdiction should be preserved.

And again:

It would be severing one of the links between this country and the mother-country if the right of appeal were cut off ruthlessly.

And again:

If there was one thing more than another we should preserve, it was the right to appeal for final judgment to the foot of the Throne.

The chief opposition to the bill itself on general grounds came from the Province of Quebec, and probably to meet this, the Minister of Justice, in later stages of the debate on the bill, said:

I do hold, and the spirit of the conference at Quebec (to consider the Confederation of the British North American Provinces) indicated, that the appeal to the Judicial Committee of Her Majesty's Privy Council must always exist, even if the Court in question is established.

Mr. Moss, K.C., a brilliant member of the Ontario Bar, supporting the bill, and speaking to a clause that made it necessary to obtain leave to appeal to the Judicial Committee, said:

The suitor would still possess the right, which he prized so much, of going to the foot of the Throne.

Mr. Baby, K.C., of the Quebec Bar, moved an amendment to the bill, which cited, *inter alia*:

That the Privy Council, composed as it is of men acquainted in general with the English and French languages, as also with the laws and institutions of England and France, affords much greater security than the proposed Court for the safety of the civil and constitutional rights of the several nationalities which this country comprises.

In speaking to this amendment, Mr. Mousseau, also of the Quebec Bar, said he was sure the Government were most unwilling to abolish the right of appeal to the Privy Council.

The chief argument in favour of securing Imperial legislation to abolish this right to appeal or the right to obtain leave to appeal was, as now, doing duty for those who entertained the same views, namely, the expense and the consequent advantage given to rich suitors.

Since the Supreme Court of Canada was established there has been a gradual weakening of the Bench. Appointments have been made for purely political reasons, and this tribunal has lost the confidence of the different Provincial Bars. The salaries have not

attracted leaders, even if leaders of the Bar were offered appointments (and this has not been the case) from time to time. In the result, the Parliament of Canada, instead of turning its attention to legislation for the purpose of abolishing the right to obtain leave to appeal to the Judicial Committee, has, for some years, continued to provide expenses for sending one of the leading members of the Supreme Court of Canada to sit with the Judicial Committee.

In 1916, in the Senate, the subject was discussed, and, after the discussion, a motion in the direction of abolishing appeals to the Judicial Committee was withdrawn.

There are, of course, strong views still entertained on the part of some, as there were in 1875, to the effect that, outside of constitutional questions, there should be no appeal from the highest Canadian judicial tribunal. The general opinion, undoubtedly, is otherwise. The fact is that much unnecessary expensive litigation is due to the purely political appointments of some members of the Courts of Appeal in the different Provinces, and the consequent lack of confidence in the decisions of these Courts.

The interesting and instructive work of Mr. H. Duncan Hall on *The British Commonwealth of Nations* deals with this subject. He is, I think, however, in error in his conclusion, based on the statement that "there is dissatisfaction felt by the Dominions with the working of the Judicial Committee of the Privy Council," so far as Canada is concerned.

There have been many reforms in procedure for the purpose of reducing the expense with regard to the Judicial Committee since 1875, when the Supreme Court of Canada was constituted. The value to Canadians of the Supreme Court of Canada has steadily declined, while the value of the Committee has accordingly increased. I think there is no foundation for Mr. Hall's observation that "in the last generation or so, feeling has steadily hardened against the idea of appeals from the Dominions being dealt with by any external Court," in so far again as this applies to Canada.

I do not overlook his reference to the late Prime Minister of Canada, who expressed the view that the tendency in Canada "will be to restrict appeals to the Privy Council rather than to increase them," and that one of Sir Robert Borden's colleagues pointed out that there was a growing opinion in Canada "that our Court should be the final authority."

Mr. Hall gives reference after reference to prove that Canada may, at any time, obtain the fullest rights of self-government, and

in fact, leave the Empire if it be so desired. Is it not significant, therefore, under this head, that one will search in vain in the proceedings of Bar Associations, or in the Canadian *Hansard*, for evidence to support his conclusion in regard to appeals to the Judicial Committee? Boards of Trade exist in every Province of Canada. No movement has yet begun in this direction in such quarters.

Dealing with constitutional questions, Mr. Hall suggests that the record of the Judicial Committee has not been satisfactory. In a very few cases of this Court an able legal critic, Mr. Ewart, who publishes what were called at first *The Kingdom Papers* (now *The Republic of Canada Papers*), and whom Mr. Hall cites in support of this view, may be able to point to unsatisfactory and perhaps inconsistent views expressed by the Committee. Nevertheless, for reasons which have already been given, the results would have been infinitely worse if the constitutional cases had been left in the hands of a Canadian Court. Doubtless, if Mr. Ewart reviewed the Canadian decisions on constitutional questions, he would fortify this opinion. May one not go further, and say that the Supreme Court of the United States would fare very badly at the hands of this eminent critic?

The Canadian Confederation has, without doubt, on notable occasions been saved from much internal friction by the existence of the Judicial Committee, and its decisions on constitutional questions.

Mr. Hall quotes the Australian delegates to the conference of 1900, as saying: "No patriotism was ever inspired or sanctioned by any thought of the Privy Council."

In Canada it is abundantly true that, whether one calls it "patriotism" or not, this portion of the Dominions has avoided disruption between the Provinces and the Federal Government by the ability to resort to this so-called "external" judicial tribunal, where constitutional questions, complex and involved, arising under the Act of British North America, have been solved by an able and impartial body, far removed from any suspicion of local or political prejudice.

It is difficult to appreciate Mr. Hall's objection to the proposed "perambulation" of the Judicial Committee. If it were practicable, it would certainly remove one of the most serious objections urged against the present system, namely, the expense. Mr. Hall refers to such a perambulation by the Judicial Committee as "a

quite unnecessary interference with Dominion autonomy in judicial matters."

We have already in Canada a perambulatory Court of Railway Commissioners, appointed by the Dominion authorities, and this has given general satisfaction.

If the present conditions do not "chafe"—and I suggest there is not the slightest evidence that they do chafe—how would this perambulatory Court, which could only exist by Canada's consent, so far as Canada is concerned, chafe? So far as the Bar of Canada is concerned, the evidence is that a preponderating majority are in favour of the retention of the Judicial Committee as the final Court of Appeal for Canada.

Mr. Gagne, K.C., of the Bar of the Province of Quebec, in a most interesting paper (see *Canada Law Journal*, March 1920, page 89, where this *Journal* reiterates its opinion to the same effect), when addressing the Ontario Bar Association on the occasion of his paper, says, among other things:

> The Acts determining the right for Canada to go to this appellate tribunal are recorded in our history as early as 1763, when Canada was ceded by France to England. The Royal Proclamation constituting and recognising our Courts reserves to all persons who may think themselves aggrieved by the sentence of any of the Courts the liberty and right to appeal to the Sovereign. The Constitution of 1791, and the Act of Union of 1840, do not bring any change to this right, and in 1867, by the British North America Act, the several Provinces were given the right to legislate on certain matters of local interest, with power to constitute their own Courts of Justice, and to alter their constitution" (p. 92).

And again:

> The Privy Council is an additional point of contact, and we need more of these points to create common sentiments, a common atmosphere, and unity of action. And, as far as we lawyers are concerned, it devolves upon us to help to maintain those of our institutions which contribute to the formation of a national spirit, and of a sense of security amid the uncertainties of to-day. . . .
>
> It is, therefore, up to us to keep in all its glamour, integrity and efficiency that splendid and unique Court whose jurisdiction is more extensive, whether measured by area, population, variety of nations, creeds, languages or customs, than that hitherto enjoyed by any Court known to civilisation.

The finality of judgments of the Supreme Court of Canada was discussed before the Senate in 1916, and, although a motion concerning it was withdrawn, it may be interesting to know the grounds set forth for the restriction of appeals to the Privy Council. One was that the appeal

to the Privy Council enabled rich persons or corporations to force poor litigants to compromise or to abandon their claims. This is not an argument of principle, and it may apply to any of our Courts ; it is, moreover, one of exception, and the additional provision, enabling poor people to plead before the Privy Council *in formâ pauperis*, seems to dispose of that objection.

The other is that men residing in Canada, and familiar with its customs, are in a better position to give justice than judges 3,000 miles away, and ignorant of our customs.

This could equally apply to the judges of the Supreme Court. Is a judge from British Columbia very much more familiar with the conditions of the Nova Scotia fisherman, or a judge from Alberta very intimate with the Civil Code of the Province of Quebec, the language of its people and its customs ?

And are we not rather looking for unfamiliarity with conditions, and with the parties in a case, when we desire to have an unbiased decision on a question of principle ? (pp. 93–4).

The Attorney-General of Ontario, a member of a so-called (recently formed) " Farmers' Government," expressed not long ago an opinion along the lines of Mr. Ewart's views in favour of the abolition of the right to appeal to the Judicial Committee. It is significant that no sooner had he done so than the Benchers of the Law Society of his Province passed a resolution condemnatory of such views, and appointed a deputation to wait upon the Premiers to express the views of the legal profession of the Province on the subject. (*Canada Law Journal*, March 1920, p. 90.)

The Attorney-General suggested at the Canadian Bar Association at Ottawa in September 1920 that the Privy Council had outlived its usefulness, but the record of the proceeding adds : " This did not meet with the approval of the majority of the members present at the meeting " (Report of proceedings published in *Canada Law Journal*, October—November, 1920, page 356).

THE NAVAL ARTICLES OF WAR.

[*Contributed by* Sir Reginald Acland, K.C., *Judge Advocate of the Fleet.*]

It is not easy to select a starting-point from which to trace the development of the Naval Disciplinary Code. It would be possible to spend a long time on the laws of Oleron, which are generally considered to be the first attempt to define the customs of the sea, and from them to trace through Richard I's and Henry VIII's ordinances the gradual growth of the present Articles of War. It will be more satisfactory, however, to start at a period when there was at all events something of a real Navy, and that may be said to be about the end of the sixteenth century. By that time the officers in supreme command at the commencement of an expedition usually issued instructions to be observed by all under their orders, and in them, rather than in the earlier efforts of King or Parliament, are to be found what may be considered for the present purpose the true origin of the Articles of War as we know them to-day.

Cadiz Expedition's Instructions.—Many of these instructions are known, and it will be sufficient to take one early example. The instructions and articles, issued by the Earl of Essex and Lord Howard of Effingham on the occasion of the Cadiz Expedition in 1596,[1] consist of twenty-nine articles, and were in the form of instructions to captains and chief officers of the Navy. Of these some sixteen or eighteen are concerned with the care of the ships and their stores, rigging and victuals, with the movements of the ships relative to the Admiral and to each other, with what is to be done in the case of a ship of a friendly nation being met with, or any ship captured.

The personal offences mentioned are: "swearing, broiling, dicing and such-like disorders as may breed contention and disorders in your ships." Picking and stealing, disobedience, landing in any country without orders, going from one ship "wherein he is placed into another" without his captain's leave, and striking either an

[1] *Naval Miscellany*, vol. i, p. 51–5, *N.R.S.*, vol. xx.

officer or "inferior person." Further, there is to be "no report or talk raised in the Fleet, whereby any officer or gentleman in the same may be touched in his reputation." Lastly, though it actually occurs in the first article, must be mentioned "that no man, soldier or other mariner, do dispute on matters of religion, unless it be to be resolved of some doubts." "If any person shall forget himself and his duty herein, he shall upon knowledge thereof receive open punishment to his shame, and after be banished from the Army." "If anybody should know of such discussions, and not report them, he, too, is to be punished and banished from the Army."

It is worth notice that neither in these instructions, nor I believe in any similar instructions before 1644, are there any provisions similar to those now contained in the first block of sections of the Naval Discipline Act under the head, "Misconduct in the Presence of the Enemy."

Warwick's Instructions. — The last instructions, which I have been able to find depending for their authority solely on the Commission of the Admiral, are those issued by the Earl of Warwick when in command of the expedition to the Isle of Rhé in 1627. They are set out *in extenso* in an interesting manuscript, entitled:

> Might and Woulde Not. Or, the Observation of the Right Honourable the Earle of Warwicke his voadge made upon the coast of portingale in the yeir of our Lord God Anne Dom^ni^ 1627, with the passadges which princypally happenede, and the proceedings thereof. But especially of the rule and goavernment in the good Shippe called the *Hector* under the Commaunde of Sir Franncis Steaurde Knight Captaine of the said Shipp and a true relation of the manner of his Fight with the Vize Admirall of Spaine the twelufe daie of Juellie 1627 Three more of the Spanish Armado giving her chace beinge neare at hande by William Ball marriner clearing himselfe of an aspertion falclie made upon him on the voadge.[1]

They are forty-four in number, and are in the main directions as to the internal organisation of the ship, and of the movements of the ships, in relation to the Admiral, but contain provisions against blasphemy, quarrelling, disobedience, desertion, striking an officer or an equal, stealing, gambling, cowardice and rape "be she Christian or Heathen." Ball's copy of these ordinances is interesting in that in two or three cases he records in an easily decipherable cipher his opinion that the particular article has been broken "wilfullie and presumpteouslie" or "by wilful stubbornness."

The orders issued by Captain Pennington for his ship the *Red*

[1] S.P. Dom., Car. I, 80, fol. 7.

Lion, which was one of Warwick's fleet, have survived.[1] They carry out Warwick's orders, mention the punishment to be inflicted for some, but not all the offences, and create four fresh offences: absence from or sleeping on watch, smoking below, entering the hold without leave and drunkenness. These orders contain two points of great interest, in that they provide for a man who strikes an officer being tried for his life by twelve men,[2] and for a recovered deserter being "sent in chains to the Admiralty prison, there to be tried for his life, according to His Majesty's proclamation in that behalf."

Authority of the Admiral.—A few years later the powers of the Crown had been greatly curtailed, and it seems to have been considered that parliamentary sanction must have been obtained before the Admiral could be in a position to execute martial law in the Fleet. On July 1, 1642,[3] Lord Warwick was appointed Lord High Admiral "by the Lords and Commons in Parliament assembled and empowered to do all acts in as ample a manner as any Admiral hath formerly done." Seven months later, in February 1642–3, this appointment was confirmed [4] and extended by giving Lord Warwick "Martial power as the general now hath on land till an Act of Parliament be passed for the further settling of the Admiralty." Apparently under the authority of this Act, Lord Warwick in 1644 issued "Lawes and Ordinances of the Sea established for the better government of the Navie." [5] These are the true originals of the present Articles of War. They are twenty in number, contain no administrative articles or articles in the nature of sailing directions; but form a short but fairly complete disciplinary code. Four subjects, not hitherto dealt with, are introduced, viz. entertaining intelligence with the enemy, concealing letters or messages sent by him, relieving or harbouring an enemy or known delinquent and presuming when any service or action is commanded to stop or put backward the service or action on pretence of any arrears of wages.

Articles of 1647.—Warwick remained Lord High Admiral until February 23, 1648–9. Meanwhile, on the fitting out of the fleet for the summer of 1647, a committee of which Warwick was a member acting under the powers conferred on them by two Acts of 1645,[6] issued orders (a copy of which from the Pepysian MSS. is in

[1] S.P. Dom., Car. I, 56 fol, 101.

[2] There was a trial of a man for mutiny by twelve men on board the *Hector* in the same expedition. He was condemned to death.

[3] *Statutes of the Interregnum*, vol. i, p. 112.

[4] Ibid., p. 76.

[5] S.P. Dom., Car. I, 503, fol. 77.

[6] *Statutes of the Interregnum*, vol. i, pp. 644 and 783.

the Admiralty Library) for the guidance of "all Captains and officers, whatsoever, and common men respectively in this fleet." They are similar to Warwick's orders of 1627, were not of general application, and are the same curious mixture of matter which would at the present time appear in the Articles of War, the King's Regulations and Admiralty Instructions, the Prize Manual and the Fighting Instructions. There are only two directly penal articles: one (the 28th) is against embezzlement, and theft of articles and stores on a prize upon the pain of losing the share of the prize, or wages, and being further punished according to the nature of the offence. The Article adds the following quaint reason for this: "it being an extraordinary privilege for them to have their wages paid, and a surplus of the shares cast in."

The other (the third in order) is comprehensive enough to cover most of the offences, other than those under the head of "Misconduct in the Face of the Enemy" in the present Articles of War.

If any seaman or other person in your ship shall commit murder or manslaughter you are to give notice thereof to the Chief of your squadron that he may be sent in safety to the gaol and receive trial according to law. And if any shall raise faction, tumult, or conspiracy, or shall quarrel, fight, or draw blood, or weapon to that end, or be a common swearer, blasphemer, drunkard, railer, pilferer, or sleep on his watch, or make noise, or not betake himself to his place of rest after the watch is set, or shall not keep his cabin cleanly or be discontented with his proportion of victuals assigned, or shall spoil or waste them, or any other necessary provisions for the ship, or shall go on board or on shore without leave, or shall commit any other insolency and disorder, or be found guilty of any other crime or offence, you are to use due severity in the precise punishment and reformation thereof without delay, according to the nature of the offence and known orders and customs of the seas.

One great point to be noticed in the above Article is the fact that murder and manslaughter were to be tried in the Civil Court.

Powers of Commissioners of the Fleet.—Early in 1648–9 [1] the Act of 1645 was repealed, and the powers of the Lord High Admiral transferred to the Council of State. In the same year Blake, Popham and Dean were appointed by Parliament to be Commissioners for ordering and commanding the fleet. They, or any two of them, were given by the Act power of martial law which they were to exercise according to such rules and articles "as shall be given, allowed or approved for that purpose, and according to the general customs and laws of the Sea." Power was given by them by

[1] *Statutes of the Interregnum*, vol. ii, p. 13.

warrant under their hands, and seals to give the like power to any officer of the fleet commanding in chief any squadron or part of the fleet divided from the rest in the absence of the Commissioners.

The Council of State added Lord Denbigh, Colonel Popham, Mr. Whitelock and Mr. Lisle to the Navy Committee "for reading the Admiralty records, and preparing instructions; they are to consider the Articles of War offered by the Commissioners that are to go to sea." [1] They did so at once, for two days later the Council of State ordered that the laws prepared for the government of the fleet were to be presented for the approbation of the House.[2]

They were considered and approved on March 5, and will be found set out in full in the *Commons Journals*.[3]

They are twenty in number, and, while altering the punishments in some cases, in substance reproduce Warwick's articles of 1644 with the omission of the clauses prohibiting obedience to orders if they tended to disloyalty towards Parliament or disservice to the State, refusal to get under weigh upon pretence of the want of victuals or stores, and certifying a deficiency of stores without orders to do so, and with the addition of clauses against motions or speeches tending to the carrying away of any ships from the service of the Commonwealth, or to the prejudice of the service, and against "lying on shore" without leave.

These articles appear to have remained in force till December 1652, when new Articles of War were approved by Parliament in the following circumstances.[4]

Appointment of Commissioners of the Fleet.—Blake had, less than a month before, been beaten by Van Tromp off Dungeness. There was a general idea abroad that some of Blake's captains had not done their duty, and on December 2 the Council of State had sent down Commissioners to the fleet with authority to "examine the deportment of the several captains and commanders as well as of the State's ships as merchantmen in the late fight with the Dutch and to remove 'those who had not done their duty.'" [5] As a consequence, several captains were removed, and some were com-

[1] S.P. Dom., I, 62, pp. 16–20.

[2] Ibid., pp. 21–25.

[3] C.J., vol. vi, p. 156.

[4] Up to this time no provision had been made for the constitution of Courts Martial. Offenders were punished either by the captain or by a Council of War, which consisted of the Admiral and captains. In December 1653 Blake, Monk, Disbrow and Penn, "Admirals and Generals of the Fleet," issued instructions dealing with the constitution of Courts Martial.

[5] *First Dutch War*, vol. iii, p. 99; *N.R.S.*, vol. xxx.

mitted to the Fleet prison for trial. There can be no doubt that Clauses XII, XIII, XIV, dealing with misconduct in the presence of the enemy, which had never appeared in any earlier articles, owed their origin directly to the defeat at Dungeness. They reappear, redrafted and rearranged, in ss. 2–5 of the existing Naval Discipline Act.

It must not be forgotten that a fleet in those days did not consist solely of His Majesty's ships. Many merchant ships were what we should now call "requisitioned," and others were "private ships of war" sailing under letters of marque, which led to the excuse for the behaviour of some of them, which is suggested in Major Bourne's report to the Admiralty Committee,[1] that "divers of them had the greatest part of their Estates engaged in their ships," and therefore shrank from risking them.

The Articles of War, therefore, are not expressly confined to persons in the service of the State. The widest expressions are used, such as "none," "no person," or "no person or persons of the Fleet," which could cover everyone, whether in the pay of the State or not.

I turn now to the actual preparation of the Articles. As soon as the Commissioners returned from the fleet the Commonwealth Government set to work in earnest to reorganise the Navy, and took in hand the necessary work for preparing Articles of War. On December 10 "the Committee for foreign affairs" was ordered "to meet on Monday to prepare laws of war for the governing of the Fleet, Mr. Thurloe to bring in such laws and ordinances of war as have been formerly made for land or sea, and Dr. Walker [the Admiralty Counsel] to attend."[2]

On December 12 the Council of State ordered[3] that:

> The Judges of the Admiralty and Doctor Walker be sent unto and desired upon consideration had of the present state of affairs and such papers as are now before them to prepare draft of Articles of War for the governing of the Fleet, and to present the same to the Committee of Foreign Affairs on Wednesday morning.

The Basis of the Articles of War.—The judges appeared to have been unusually prompt, for on December 18 a Committee was appointed to prepare the Laws and Articles of War for the fleet, and "to bring them into the Council on Monday next," and Parliament was to be "humbly moved that Tuesday next may be

[1] *First Dutch War*, vol. iii, p. 394; *N.R.S.*, vol. xxx.
[2] S.P. Dom., I, 68, pp. 63–7.
[3] S.P. I, 68, p. 73–8.

appointed for the taking into consideration . . . of the making of laws and ordinances of war for the regulating of the Fleet." On December 21 the laws and ordinances were read to the Council and presented next day to Parliament. They were debated on three days, amended to some extent, and finally passed on December 25, 1652.[1] The actual preparation and approval of the document lasted, therefore, only fifteen days, and only a week from the date of the appointment of the committee. How well the work was done is evident from the fact that, with a few exceptions, every provision contained in them appears in substance, and in some cases in the actual words, in the Articles of War in force to-day, more than 260 years later, and it will be seen that it has only been necessary to add to them substantially in a very few respects. They contain thirty-nine Articles.[2] The first, as is the case to-day, provides, in the language of those days, for the service of Almighty God and the religious observance of the Lord's Day. The last corresponds almost exactly with s. 43 of the present Naval Discipline Act. It is unnecessary to go through them all, but it is worth while to point out those which doubtless owe their introduction to the political conditions of the day.

Article VI prohibits the harbouring or concealing of any enemy or known delinquent or rebel on shipboard, and carrying any such persons beyond sea without licence.

Article VII is worth quoting in full, though it had appeared in earlier articles, because of the light it throws on some of the less reputable practices of the day.[3]

> None shall presume [wilfully or wittingly] to injure or wrong at sea the known friends or Allies of this State, either members of this Commonwealth or strangers not in enmity upon pain of such punishment as the nature and circumstances of the offence shall require, nor in visiting any ships or vessels, either take goods forcibly or by terror extort them upon pain of death [or other punishment according to the nature and circumstances of the offence].[4]

Article XIX is as follows:

> All captains of ships, having once taken any commission for the

[1] *C.J.*, vol. vii, pp. 234-5.

[2] *First Dutch War*, vol. iii, p. 293; *N.R.S.*, vol. xxx.; *B.M.E.*, 884-9.

[3] It has been said that at the close of the sixteenth century "when the Spanish flag was driven off the seas, the men became almost frankly pirates, and would obey no one who would not consent to seize neutrals or allies" (Openheim's *Notes to Monson's Naval Tracts*, vol. ii, p. 248; *N.R.S.*, vol. xxiii).

[4] The words in brackets were added during the debate in Parliament.

taking of prizes according to the Act, Ordinances or Order of Parliament, or served as a private man-of-war, or received any pay or impress or been otherwise employed from or under the Parliament . . . shall either turn to the enemy or declare themselves against the Parliament, or wilfully set upon, fight with, surprise, or take any ship or vessels standing in obedience to the Parliament or any of their adherents, or shall turn robber and use to exercise piracy either upon or against any merchants or other ships shall be punished with death.

Article XXVI prohibited on pain of death the use of any words tending to the death of the Admirals or Generals.[1]

Article XXVII ran as follows:

Every captain shall keep the number and complement of men allowed his ship full and complete, and take care to have a full proportion of mariners and seamen, and to get and keep such as are able and healthful, and fit for service, and not boys or infirm persons, but so the ship may be well manned for fight, and not be pestered with idlers and boys upon pain to be punished as the quality of the offence may deserve.

Powers of the Commissioners.—Another Act creating Commissioners and conferring powers on them, which is not printed in the collection of *Statutes of the Interregnum*, was passed in 1652,[2] and in July, 1653,[3] a new Commission was created by an Act which gave the Commissioners power to frame "Articles, Orders and Ordinances of War and Military Discipline to be presented to Parliament for the better regulating, governing and discipline of the officers, seamen, and army at sea." It was to be in force only till December 4, and on the third of that month was continued for another year.[4]

Parliament must have known that it had passed the Articles of War in the previous December, and the power above referred to probably did not mean more than that Commissioners could make additional Articles of War if necessary. The Commissioners named in the continuing Act were different from those named in the Act of July, but included Blake, Monk and Disbrow, who afterwards issued regulations, which had a great influence upon the constitution of Naval Courts Martial. A further Act was passed in 1659,[5] conferring large powers on the Commissioners (who were again different from those mentioned in the Act of December, 1653). It did not

[1] This had appeared in the Articles of 1644 and 1649, and was no doubt inserted in the first instance in consequence of the then existing political conditions in the country.

[2] *C.J.*, vol. vii, p. 219.

[3] *Statutes of the Interregnum*, vol. ii, p. 708.

[4] Ibid., vol. iv, p. 12.

[5] Ibid., vol. ii, p 1277.

include, however, the power of making Articles of War. The Act is, however, important, as it recognises the existence of the "Articles, Orders or Ordinances of War for the sea." This Act was to continue in force till December, 1659. Shortly after its expiry another Act was passed on February 2, 1659–60,[1] again recognising the existence of the Articles of War. This Act was to be in force till October 10, 1660.

Before that time, however, the Restoration had taken place, and the whole work which had been done for the discipline of the Navy by the Commonwealth Government was swept away; but not for long. In 1661 the Act 13 Car. II, c. 9 was passed. In it the Articles of War were included almost word for word, with the exception of the above mentioned five Articles, and one other, Art. XXX, prohibiting embezzlement, which was probably considered to be sufficiently covered by Art. XXVIII, and with such verbal alterations as were necessary to make them apply to the ships and officers and men in the service of the King, instead of the Commonwealth. One Article only was added, viz. one punishing unnatural offences with "death without mercy."

Payments to Convoys. — Only one alteration requires any lengthened notice. The last sentence of Article XXXV of the Parliamentary Articles of War, prohibiting under penalty of being cashiered captains who, having been "appointed for convoy and guard of merchant ships," should demand, receive, or take, any fee, gratuity or reward, in respect of the convoy. This proved quite inadequate. Captains of ships would wait about, and then, though they had not been appointed for convoy, would exact from merchants and others payments for convoying their ships. The words "appointed for" were accordingly omitted, and the penalty attached to taking any reward for convoy whether the officer was formally told off for that duty or not.

There was no general revision of the Articles of War until 1749, when the Act 22 Geo. II, c. 33, was passed, but before that date certain alterations in the law had become necessary or desirable. The thirty-sixth section of the Act of Charles II had expressly limited the jurisdiction of the Lord Admiral, and others, whose authority depended on his, to—

such offences specified in the several Articles contained in this Act as shall hereinafter be done upon the main sea, or any ships or vessels being and

[1] *Statutes of the Interregnum*, p. 1407.

harbouring in the main stream of the great rivers only, beneath the bridges of the same rivers nigh to the sea within the jurisdiction of the Admiralty, and in none other places whatsoever, and committed only by such persons as shall be in actual service and pay in His Majesty's Fleet or ships of war.

This excluded jurisdiction over men belonging to the fleet, who had committed any offence on shore, abroad or at home, and accordingly to remedy this defect an Act was passed in 1719 [1] which provided that persons in the sea service, who committed offences against the Articles of War on shore in foreign parts, might be tried and punished, as if the offences had been committed on the main sea.

Conveyance of Merchandise.—Two years later, in 1721,[2] a section was introduced into an Act entitled "An Act for the more effectual suppression of Piracy" to deal with the carriage of merchandise in the ships of the Crown, a proceeding on the part of officers commanding ships, which had long given trouble to the authorities.

As early as 1674 Pepys observes that this abuse had grown to such dimensions that the captains not only took in and transported merchants' goods, but published beforehand their purpose of so doing upon terms of trade and other conditions.[3] An example was made of a captain of good reputation, and regulations were made against the practice, but they do not appear to have been very effectual.

Accordingly s. 8 of the Act to which I have referred recited that:

> Great interruptions and inconveniences may attend His Majesty's Service by the captains or commanders or other officers of His Majesty's ships or vessels of war receiving on board such ships or vessels goods and merchandise and trading therewith contrary to instructions which strictly forbid their doing the same,

and officers were prohibited from receiving merchandise on board, in order to trade or merchandise with the same, at his own or another person's gain, except gold, silver or jewels, goods from wrecked vessels, or goods which he may have been ordered to receive on board. Any officer offending was to be tried by Court Martial, and, on conviction, was to be deprived of his command, rendered incapable of service in the Naval Service of His Majesty. and lose the pay due to him. Further, the owner of the goods was to forfeit their value, one half of which was to go to the person who

[1] 6 Geo. I, c. 19, s. 4.
[2] 8 Geo. I, c. 24, s. 8.
[3] Tanner's *Introduction to Catalogue of Pepysian MSS.*, p. 193; *N.R.S.*, vol. xxvi.

gave the first information of the offence, and the other half to the Greenwich Hospital. Even these drastic penalties did not entirely stop the practice, partly because of the difficulty of obtaining sufficient evidence, and partly, I suspect, because of the unwillingness of Courts Martial to convict.

I have in my possession the printed report of the trial at Portsmouth of Admiral Duckworth in 1805 [1] for bringing home mahogany and all sorts of goods in the *Acasta* frigate. The charge was preferred by a Captain Wood, who alleged he had been badly treated by Sir John Duckworth. The evidence, in my opinion, was clear against the Admiral, an opinion which is supported by that of five of the most eminent lawyers of the day, of whom two were afterwards judges, one was Solicitor-General, and one afterwards became Prime Minister. But the Admiral was unanimously and honourably acquitted, the charges said to have been "gross, scandalous, malicious, shameful and highly subversive of the discipline and good government of His Majesty's Service." The President handed back his sword to the Admiral with a laudatory speech, after which "Sir J. T. Duckworth and a large party of friends dined with the Commissioner, Sir C. Saxton," [2] and doubtless rejoiced over the defeat of Captain Wood.

The Act of 1749. — There were no further alterations in or additions to the Articles of War till 1749, when the statute of Charles II, and all subsequent statutes which dealt with the discipline of the Navy were repealed, and the Act passed which governed the Navy till 1860.[3] The changes made in the Articles of War were slight, were chiefly verbal, or dealt with punishments. The first alteration of substance was the addition to Article XVI of a clause imposing the penalty of cashiering on officers who receive or entertain in their own ships deserters from other ships. The next was the addition of a new Article aimed at the offence of making or signing false musters, upon proof of which offence the officer was to be cashiered. A fresh clause was introduced which made scandalous, infamous, cruel, oppressive or fraudulent behaviour unbecoming the character of an officer an offence. The next article for the first time made mutiny, desertion or disobedience to any lawful command *in any part of His Majesty's Dominions on shore* offences, and thus enabled a Court Martial to

[1] *Minutes of the Court Martial on Sir J. T. Duckworth, K.B.*, Portsmouth, Mottley Telegraph Office. No date.

[2] *Naval Chronicle*, vol. xiv, p. 84.

[3] 22 Geo. II, c. 33.

deal with such offences committed in this country. This is, of course, the origin of the distinction which appears in s. 46 of the present Naval Discipline Act.

The provisions of the Acts of 1719 and 1721, to which I have called attention, were introduced into the Articles of War, but, excepting in the respects to which I have already called attention, the Articles of War of Charles II were in substance reproduced.

From the year 1749 to 1860 no alteration was made in the Articles of War, nor was any new offence created, unless it be that by s. 12 of an Act passed in 1853,[1] which created a civil offence of bringing spirituous liquors on board His Majesty's ships, can be said to have introduced the offence of "smuggling" as it is now known, which is charged under s. 43 of the Naval Discipline Act.

During this long period, however, several Acts of Parliament were passed, which affected the powers of Courts Martial, especially in the domain of punishments, with which, however, this article does not deal.

The Revision of 1860.—In 1860 the Articles of War were entirely redrafted and rearranged in a much more convenient form than before. A very large number of alterations in the language were made without in any case substantially altering the sense. It is quite unnecessary to refer to the Articles in detail, but attention may be called to the additions which were made. They were very few in number; a clause was introduced creating an offence of absence without leave. Courts Martial had before this found persons guilty of being absent without leave when charged with desertion, but it was an irregular proceeding for the purpose of reducing the sentence. This addition made such finding legal. A new clause was introduced, making it an offence to malinger or to do any wilful act or to disobey any order in hospital or elsewhere with intent to produce or aggravate disease or infirmity or to delay the man's cure. The only other addition of importance was the Article which made masters of ships under convoy liable to obey the commands of the captain of the convoying ship. No punishment was prescribed, but the commanding officer of the convoying ship was authorised to compel obedience by force of arms if necessary.

It is a wonderful tribute to the excellence of the work done in the seventeenth century that so few changes in the substance of the Naval Code should have become necessary in a period of nearly three hundred years. Of course there was a great modification in the penalties during this time, but this belongs to another branch of the subject.

[1] 16 & 17 Vict. c. 69.

PRICE-FIXING IN AUSTRALIA DURING THE WAR

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Under the Commonwealth of Australia Constitution Act, 63 & 64 Vict. c. 12, authority is given to the Australian Parliament to legislate on thirty-nine prescribed topics. The powers of the State legislatures to make laws for the peace, order, and good government of the respective States "in all cases whatsoever" are accordingly restricted; but restricted only so far as power is given to the central Parliament. Thus, by s. 51 (1) of the Constitution, the Federal Parliament is given power to legislate for the Commonwealth with respect to "trade and commerce with other countries, and among the States"; so that the right of the State Parliaments to deal with trade and commerce within their own borders is not taken away by the Constitution, and therefore remains subject to the limitation mentioned below. It follows that the Federal Parliament is unable to control Australian commerce, except so far as that commerce is foreign or inter-State. Intra-State trade it cannot touch. Labour Governments elected to Federal power on sweeping platforms designed to extinguish trade combines, trusts, and monopolies feel themselves hedged in by this constitutional position, and attempts were made in 1911 and 1913 to extend the Commonwealth power to cover intra-State trade. Both attempts were made by referendum under s. 128 of the Constitution, and both attempts failed. On the declaration of war in August 1914, the Federal Labour Party was in opposition, but it was returned again to office on the double dissolution occurring in the following month.

The limitation on the power of the State to control its own trade and commerce, referred to above, was not appreciated to the full at the outbreak of war. The Commonwealth Parliament is given exclusive authority under the Constitution to legislate with respect to the naval and military defence, both of the Commonwealth and of the several States. And this authority has since been held to be a paramount one, giving the Federal Parliament power, in effect, to adopt whatever measures could be reasonably deemed necessary for defence purposes (*The Bread Case, Farey* v. *Burvett*, 21 C.L.R. 433) and denying to the King in right of the several States his common law prerogative powers of defending the realm, such powers having passed to the King in right of the Commonwealth (*Joseph* v. *Colonial Treasurer* (N.S.W.) 25 C.L.R. 32).

The Immediate Effect of War.—The Federal Government in power

at the outbreak of war probably considered that it lacked the power necessary to cope with the evil of high prices, and the Premiers of the various States were invited by the Prime Minister to deal with the control of food-stuffs and prices. This menace was already apparent early in September 1914, as is shown by the report of the N.S.W. Necessary Commodities Control Commission dated September 15, 1914. Almost immediately after the declaration of war the prices of imported commodities were increased by the wholesale grocers from 7½ to 20 per cent. and in one instance (cream of tartar) by 100 per cent.

> This sudden increase seems [says the report] not to have been the result of a calm consideration of the effect upon prices necessarily caused by the war; nor of the duty which the state of public affairs imposed upon the importers of taking into account the effect of improvident increases of prices upon the mind and well-being of the community. The importers seem to have been almost overwhelmed by the fact that their stocks, which they had been accustomed to replenish, and in most cases turn over, some nine or ten times a year, had been suddenly stopped, without, for the moment, any prospect of renewal. They were also troubled by the fact that they had consignments in German vessels, indefinitely shut up in various neutral ports, and that it might be impossible to replenish certain lines.

From the outbreak of the war, until July 1916, the control and regulation of the prices of commodities were left by the Commonwealth Parliament to the various State authorities. It should be emphasised that no accepted political theory or dogma stood in the way of such State regulation. The Victorian Prices of Goods Board was an authority by no means conspicuous in actual fixation of prices under the Acts of 1914 and 1915, but even it reported that—

> legislators of all shades and opinions were impressed with the necessity of taking steps to prevent the exploitation of the community by means of the "cornering" of foodstuffs and undue inflation of prices, as a result of the war. This feeling was not confined to Victoria, but was general throughout the Commonwealth.

Australian public opinion is, as pointed out by one of the present writers in dealing with New South Wales Fair Rents Legislation (JOURN. COMP. LEG., 3rd Ser., vol. ii., p. 10) seldom disturbed by the fear that practical legislative proposals may offend against "fundamental economic laws" if it is seen that the scheme so criticised is apparently fair in its projected operation.

Consequently the Parliaments of all the Australian States, with the exception of Tasmania, passed price-fixing legislation, and within two months from the outbreak of war, tribunals were appointed to administer the various Acts. The New South Wales legislation and consequent control will be referred to later, but the schemes adopted in the other States will be shortly outlined in the first instance.

Victoria.—In Victoria, the Prices of Goods Act was passed on September 9, 1914, notwithstanding the strenuous opposition of the conservative Legislative Council. Provision was made for the appointment of a Board, which should report to the Governor in Council as to what should be the maximum prices of all food-stuffs. In 1915, an Amending Act was passed, limiting the Board's functions to that of reporting with respect to goods, the selling price of which had been affected by the war. By the Food-stuffs and Commodities Act passed simultaneously, the Board was given power to take a census of stocks. The Governor in Council, after recommendation by the Board, could declare any price to be the highest selling price, and persons selling at any higher figure were liable to a maximum fine of £500. Prosecutions, however, could be instituted only with the consent of the Attorney-General. The Board was composed of five members, the Chairman being a Minister, and the four others representing the wholesale merchants, the retailers, the producers and the consumers. The operation of the Act was for a period of four months only, and it was only re-enacted for a total period of twelve months.

It should be noted that the Victorian Government of the day was Liberal-Conservative, and was concerned rather for producers' than consumers' interests. The Labour Party has never attained in Victoria State politics the power which it has often enjoyed in the other States, and in the Commonwealth, and it was quite unable to force the adoption of its extensive scheme of price-fixing. Further:

(1) The Victorian Board regarded its functions as limited in a very definite way. In its final report dated September 30, 1915, it says:

> Under the Victorian Act it is clear that no general fixation of prices was ever intended or contemplated. What was aimed at was the prevention of the undue inflation of prices, and undue restriction of supplies in time of war. Apart from this, trade and business generally were to be allowed to flow in the ordinary channels in the usual way. If advances in prices were legitimate, the Board was powerless to intervene. In fact, the Price of Goods Board could only act when it found, after proper investigation, that prices were being unduly advanced or supplies unduly restricted.

(2) The Act made no provision for adequate staffing, owing to its extremely short operation. In contrast with this Act the New South Wales legislation was for the duration of the war.

(3) No action was taken to deal with the prices of general groceries, arrangement being made with the wholesale merchants, that each increase made by them should be notified to the Board.

(4) A corner in wheat was prevented by the Board's recommending, and the Government adopting, a fixed maximum of 4*s.* 9*d.* per bushel for wheat in September 1914. Two months later the price was increased to 5*s.* 6*d.* per bushel. But on December 1, 1914, the Board recommended—

> that the price fixed should be taken off altogether, and trade in wheat allowed to run in the ordinary way, as the large holdings have been disposed of at

fixed prices, and practically the whole of the wheat of the State is held by farmers for seed purposes, or by genuine millers, merchants, etc.

This was done, but the fear of subsequent fixation prevented importing, and the Government was forced to provide wheat for the State. This was done at considerable loss, each bushel costing 8*s.* landed at Melbourne.

(5) The price of flour was fixed on the basis of the price of wheat, and increased with the latter. When the fixed price of wheat was removed in December 1914, flour was at £11 17*s.* 6*d.* per ton, and the selling price rose to £17 per ton—the price arranged by the Government with the millers who took the wheat imported by the State.

(6) Owing to stocks of flour being held by the bakers, the Board was faced with great difficulty in fixing the price of bread. To fix the latter on the low price of flour at which the stocks were bought was equivalent to closing down numbers of bakery establishments, which had not held supplies. The Board adopted the other alternative, and fixed the price of bread on the basis of flour at £17 per ton, the price at which flour milled from Government wheat was supplied to the millers.

(7) The 1915 Act limited the power of the Board to deal with commodities the prices of which were influenced by the war. The drought of 1914–15, however, enormously reduced the supply of butter, and the large increase in price was due to that, and only in a secondary sense to the war. The Board therefore got into touch with producing and the trading interests in butter, and the price was fixed from time to time at the joint suggestion of those two interests.

Queensland.—The Queensland Parliament passed the Control of Trade Act in 1914, and substantially enacted the provisions of the Necessary Commodities Control Act, 1914, of New South Wales. Prices were fixed extensively, and included bacon, biscuits, kerosene, tobacco, many lines of general groceries, many classes of meat, dairy produce, flour, bran, pollard, drugs, candles, patent medicines, infants' food and chemicals. The rates, which were constantly amended, referred to wholesale selling only ; but it was provided that the retail prices should bear the same relation to the wholesale rates as before the war. In Queensland, for the greater part of the war, the Government was Labour, and the Liberal Government in power at the outbreak of war had less special regard for producers' interests than in Victoria.

South Australia.—In South Australia the Act administered was the Prices Regulations Act, 1914. The Act provided for the appointment of a Commission of three, one being a Supreme Court Judge. Wide powers were given, including that of declaring any commodity a necessary of life, and heavy penalties were provided for selling at a higher rate, or for refusing to sell at the fixed rate : in the latter event, provision was also made for forfeiture of the goods to the Crown. But, though these powers were given, they were not exercised, the activities of the Commission being confined to periodical returns of prices and special inquiries in camera. In their report of July 12, 1915, the Commission point out that

they have kept in close touch with the mercantile and trading community, and that they—

have always realised the heavy responsibility which rests upon them in the fixing of prices, a responsibility not shared by the Government of the day, or any other body or person. They are charged with duties, judicial in character, to prevent exploitation of the public, but not with a duty to interfere with prices which, in their opinion, cannot be declared to be unreasonable.

In point of fact, the only price actually fixed by the Commission was that of sugar at the request of the Commonwealth Government—a formal matter pursuant to agreement.

This inactivity did not satisfy the war-time demand for more spectacular action, and the Vaughan Labour Government, on being returned to power in 1916, altered the personnel of the Commission. More frequent inquiries were held, and greater publicity given to the work of the Commission. The policy was changed from that of acquiescence or threatening without fixation to that of publicity with occasional fixation; and prices were fixed for milk, bread, biscuit, flour, tea, sugar, self-raising flour, and oatmeal. The effect of the 1914–15 drought had been overcome by the time the new Commission began active work, and care was taken to see that decreases in prices were sufficient as the supplies returned to normal.

Western Australia.—In Western Australia the Act passed was the Control of Trade in War Time Act, 1914. Power was given to the Executive to appoint a Royal Commission to inquire into the prices of food-stuffs, and to recommend the adoption of maximum prices to the Executive. The Commission appointed did not make as extensive investigations as were made by the authorities in the other States, and little actual fixation was done. The prices of flour, bran, milk, chaff, and sugar were fixed. Drastic provisions were made for breach of the Act, but these were amended, and the operation of the Act was also limited owing to the duration of the war, so as to terminate on September 30, 1915; and, although a Labour Government held office, the Act was not re-enacted after that date.

New South Wales.—In Tasmania no state action was taken, the Government being conservative in character at the outbreak of war, and remaining so thereafter. It was in New South Wales that the greatest activity was shown. In August 1914 a Labour Government was in office, supported by a commanding majority. The Act was entitled the Necessary Commodities Control Act, 1914, and was introduced by the Attorney-General, who modestly described the Act as—

legislation in order to prevent a certain small section of the trading community from taking advantage of the present situation and effecting "corners" in various articles, or in putting up the prices of those articles beyond what they really ought to be.

The Act was a short one of eighteen sections. Provision was made for the appointment of a Commission of three, one of whom had to be a Judge of the Industrial Arbitration Court, the other two being appointed by the Governor. The duty of the Commission was " to inquire into, and report as to the prices of necessary commodities." In such inquiry and report, the Commission was to deal with " what should be the highest selling prices, having reasonable regard to market conditions." The Governor (*i.e.* of course the Government acting on his Minister's advice) was empowered to declare maximum prices at a figure not lower than that recommended by the Commission, to vary such prices, to declare that they should apply to certain localities only, and with respect to certain qualities or descriptions or quantities only. Penalties were provided for attempting to sell at an excess price, or refusing to sell at the fixed price. Commodities withheld from sale could be seized and forfeited, and, incidental to this, was a power of search. The Commission was given the powers of the Supreme Court with respect to witnessing books, and punishment for contempt. Provision was also made for obtaining the returns of necessary commodities, and for the appointment of officers. A " Necessary Commodity " was defined in the Act, so as to include fuel, gas, any article of food or drink or any article which enters into the composition or preparation of any article of food or drink for man, or for any domesticated animal : and, as if this were not wide enough, the Commission could recommend to Parliament the selection of further articles as " necessary commodities " and Parliament could add them to the list by resolution of both Houses.

The Commission in New South Wales was provided with an adequate staff of officers and inspectors, and the Chairman gave practically all his time to the work. It was " more far-reaching in its investigations, and drastic in its recommendations, than any other similar body in any other State " (Wilkinson, p. 34).

In addition to the main necessaries of life, the supplies and prices of such articles as kerosene, plum puddings, biscuits, coal, gas, rum, brandy, whisky, and cigarettes were investigated. The selling prices of pigs, bacon, and pork were fixed in order to prevent their export to the other States at enhanced prices, the Commission threatening to seize and distribute if attempts were made to export in that way. An attempt was made in September 1914 to fix the price of wheat, but it was found impossible to force sales at the fixed price, and the Government thereupon acquired the whole of the New South Wales supplies, which were distributed by the Government to millers and the public, at one price in controlled quantities.

In the case of bread and flour, the scheme adopted was to take the prices in force in the various New South Wales towns on August 1, 1914, and to grant increases from time to time. This recognised differences of production and distribution in the various parts of the State, and worked effectively. In the case of bread, the President of the Commission, in

dealing with an application by one of the largest bakers of Sydney, said:

Taking Mr. Gartrell's figures as they stand, he shows a loss of 9*s*. 2*d*. per ton with these very large items represented by depreciation and material, not to speak of any other. Now, what is your application? The application is for ½*d*. per loaf increase. Of course, in the evidence there were great differences in the number of loaves said to be produced by a ton of flour, but I think Mr. Gartrell's own figures as to the quantity produced were 1,298; take it at 1,300 in round figures per ton. If you work out the difference that would be represented by the increase of ½*d*. per loaf on an output of 50 tons per week, it would amount to an increased revenue of £150 per week. So that this is an application which, if granted, would return to Mr. Gartrell, allowing all his figures for rent and depreciation, £150 per week, which is to cover his actual loss; his loss is under £30 per week: that is, £120 more than his loss. Do you think that we ought to put such a price up to the general public as will compel them to give him such a further profit above what he receives at ordinary times, which I presume to be fair? It allows the whole of the capital value of his business to be taken into account, his own stated rate of depreciation, and he actually asks us to put up the price, so that not only will his loss of £30 per week be covered, but that he will get a return of £150.

The price of butter was fixed at a much lower rate than in the other States, and the Government was forced to import butter from America. Milk, fodders, and many other articles were dealt with.

Federal Control.—At the time the Federal Government set up its price-fixing machinery, the only States actively administering their legislation were New South Wales, Queensland, and, to a lesser extent, South Australia. Meanwhile, the Fisher Labour Administration had considered the time opportune for the grant by the people to the Federal Parliament of further powers under the Constitution. Late in 1915, proposed laws for the alteration of the Constitution, including a law to enlarge the Commonwealth powers as to "trade and commerce," were passed by each Federal House, and writs were issued for the submission of these to the people. It was felt, however, that it would be inadvisable, in face of the war position, to force on a bitter political contest, and the Premiers of the States met the Prime Minister of the Commonwealth—Mr. Hughes (who had just succeeded Mr. Fisher) in conference in November 1915. The result was an agreement by the Premiers to bring forward legislation in their respective Parliaments to *refer* and grant to the Parliament of the Commonwealth the additional powers sought, such powers to be exercised only during the period of the war. The only State Parliament which passed the proposed Act was that of New South Wales, which enacted the Commonwealth Powers (War) Act No. 65 of 1915. The constitutionality of the bargain and of this consequential measure never had to be considered by the High Court, but prominent Australian jurists declared that the arrangement was futile, and the Act mentioned a nullity.

Notwithstanding that New South Wales was the only State which

passed the legislation, the Hughes Government did not go on with the referenda, but determined to rely on the war power. The War Precautions Act was passed in 1914, and amended from time to time ; it was based on the English Defence of the Realm Act, and was designed to give the Commonwealth Government full power in cases of emergency arising out of the war. The Act and regulations were given the widest and fullest recognition by the High Court of Australia in a series of cases, the first of which was the Bread Case mentioned above.

Various demands to deal with the question of the cost of living being made on the Federal Government, by its supporters in and out of Parliament, regulations were accordingly passed under the War Precautions Act early in 1916. A " Commonwealth Prices Adjustment Board " of five members was appointed to make inquiries, and to recommend to the Governor-General. The latter was empowered to fix maximum prices, and proclaim the areas in which those prices would operate. At first only flour and bread were dealt with, but the Board's authority was extended in July 1916 to cover food-stuffs, necessary commodities, shipping freights, and services. A Price-fixing Commission was appointed to each State to make local recommendations and inquiries. These Commissions were co-ordinated by a central department at Melbourne, which replaced the Board.

It should be pointed out in connection with the Federal scheme :

(1) In 1915, before the various State Boards were replaced in any way, the Commonwealth Government had fixed the retail price of sugar, incidentally to its taking over the sugar industry with the Colonial Sugar Refining Company, acting as agent and refiner for the Government.

(2) In July 1916 a Federal proclamation under the War Precautions Act was issued, preserving all the existing determinations of the State Boards, so far as they were not inconsistent with a Federal determination.

(3) Again the prices of bread, wheat, and produce were fixed, numerous other articles were dealt with by the Federal authority, and the list finally included articles as arrowroot, baking powder, barley, biscuits, bran, bread, cocoa, coffee, cornflour, curry-powder, tinned fish, jams, mustard, olive-oil, pepper, rice, sago, salt, butter, milk, cream-of-tartar, canned fruit, dried currants and raisins, meat, ammonia, benzine, boot-polish, boracic acid, disinfectants, epsom salts, matches, and soaps.

(4) At first the price of bread was fixed only in the capital cities of the various States, but the greater part of the Commonwealth was subsequently included. The bakers contended that the price fixed was too low, but the Federal Government claimed that the policy was a complete success, and had saved the consumers of bread £432,566 between March and August of 1916.

(5) On one occasion in July 1916 the grocers of Victoria decided that, as the prices of flour, sugar, and butter were fixed, they would " pass on " to the public certain increases of wages to grocers' assistants by increasing the prices of groceries, not so far regulated. A special order under the

War Precautions Act was thereupon made, and prices fixed generally, as on July 1, 1916.

(6) In the case of butter, maximum prices were fixed on October 26, 1916; on export, of course, a much higher price was available to the factories, and an arrangement was therefore made by which the latter should all allocate the same proportion of their output for export.

(7) Towards the end of 1916 the great increase in the cost of living forced on the Government a policy of active fixation. In 1917 greater efforts were made to overcome the shortage caused by the enemy submarine campaign; imports and exports were rigorously controlled by the Customs Department. Special subjects such as meat, clothing, boots and rents were taken up, and a large amount of evidence taken in connection with them by the Inter-State Commission. With the exception of meat, the recommendations of the Inter-State Commission were not acted upon by the Government, as hostilities had ceased before the policy of the Government was definitely announced.

(8) After November 1918 fixed prices were gradually cancelled, and restrictions lifted. The low price of sugar was due, as already indicated, by taking over control of the whole industry; but in the case of bread, undoubtedly, prices were lower, owing to the action of the Price-fixing authority, than they would otherwise have been.

Price-fixing in Australia during the war was certainly in the nature of a temporary expedient, and there was no precedent for policy or procedure, when the subject was approached in August 1914. The solutions attempted by the Federal and State authorities were not based on principle or doctrine, but on the exigency and policy of the moment. Control was powerfully maintained in Sydney and Brisbane by the State Tribunals up to 1916; in Melbourne, Adelaide and Western Australia little was done, and in Tasmania nothing at all.

In October 1916, before Federal control had assumed very large proportions, a bulletin was issued by the Commonwealth Bureau of Statistics, giving the purchasing power of money in the six States: the figures relate to forty-six items of food, including groceries, meat and dairy produce, and give the amounts required in 1915, and in the first quarter of 1916, to purchase what would have cost £1 in the year 1911. They are as follows:

	1915			1916		
	£	s.	d.	£	s.	d.
Sydney, N.S.W.	1	7	11	1	11	4
Melbourne, Victoria	1	8	3	1	10	2
Brisbane, Queensland	1	7	6	1	11	0
Adelaide, S. Australia	1	9	9	1	11	0
Perth, W. Australia	1	9	8	1	10	1
Hobart, Tasmania	1	8	11	1	11	10

In Sydney and Brisbane, therefore, where every attempt was made

to control prices, the increases on retail prices were actually greater than in Melbourne, Perth and Hobart.

Moreover, during the twelve months prior to the first quarter of 1915, owing mainly to the full supply of wheat, meat and dairy produce in New South Wales and Queensland, prices in Melbourne, Perth and Hobart increased to a greater extent than in Sydney and Brisbane. But when the supplies available to the two last mentioned cities became exhausted, figures indicate that the increase in average prices there was higher than in the other States where prices were not fixed. As Wilkinson points out (p. 66), the statistics show that—

> as long as stocks of a commodity last, it is possible to keep its selling price low by fixing it; but this low price induces a higher consumption and a smaller production, and this in turn has a tendency to cause a greater ultimate increase in price.

The statistics, moreover, are far more properly comparable in Australia than in many other countries, because of the similar habits and standard of living throughout the nation, and of the absence of inter-State competition at the time, owing to the great distances between the capitals, and the consequent cost of transport, and also to the restrictions imposed by the State authorities. It was on the strength of such comparisons that the Victorian Minister for Agriculture arrived at the conclusion:

> I can only say that the experience of all Governments who have tried price-fixing has been disastrous. The very recent experience of the Australian States has not resulted in the benefits that the sponsors of price-fixing hoped would be obtained, and certainly injury in many directions has followed. After a short experience the (Victorian) Ministry arrived at the conclusion that price-fixing was unnecessary.

It is impossible to agree with such a conclusion stated in these unqualified terms. It must be remembered that one of the objects of price-control in time of war was to promote economic stability at home as a basis of military efficiency abroad; no doubt this reference to the all-important object of defence was not accepted as a principle by all the States. In two of the States—New South Wales and Queensland—the removal of Federal restrictions on prices has been followed by the reintroduction of price control; the Act in Queensland is termed the Prevention of Profiteering Act, 1920, and the New South Wales Necessary Commodities Control Act of December 1919 is shortly to be replaced by a measure similar in purpose and name to the Queensland measure.

But in the activities of the other States, and of the Federal authority, especially, of course, in the latter case, control was designedly incidental to the defence of the country. There are three ways in which it may be said that price-fixing in Australia contributed to this object.

In the first place, local products available, and usually intended for export, were regulated so that the Australian consumers should not be

asked to purchase on the basis of world parity. The case of butter and bread is in point, although it is not quite clear that there was not a considerable injury to the producing interest to be set off against the immediate advantage to the consumer.

In the second place, the absence of supplies from foreign countries, and the smallness of supply available in Australia, made it essential to control articles like fertilisers and galvanised iron. It was possible, in this case, to fix prices, so that the local industries could be encouraged, and the public still protected, and the result was the prevention of inflated values.

In the third place, actual trading profits had to be examined, and a fair return given on the basis of capital invested, personal exertion and business risk. The best example of this was in the case of groceries, where the tradesmen would supply details of their business to the tribunals sitting either in camera, or at any rate not disclosing business secrets.

Exceptional cases were, of course, the Federal control of the sugar monopoly, and the organisation of the wheat and wool pools. These were not really instances of price-fixing, as the whole supplies were in effect bought up and resold by the Government.

On the whole, the consuming public had their interest safeguarded, and, what was perhaps even more important, they *thought* that they were being protected against undue profit-making. Further, the small trader was made secure against the danger of markets being cornered, whilst the larger houses were protected by the steadying of wholesale markets, and the prevention of the buying up of stocks by speculators. The statistics referred to rather discount the retarding effect which the public understood was being brought to bear on prices by the controlling authorities. But the feeling of security was vitally important to Australia, and it took some years from the commencement of the war for the word " profiteering " to acquire general acceptation and the privilege of being printed in newspapers and statute-books without inverted commas.

NOTES ON THE LAW OF MINES IN SOUTH AFRICA.

(With Special Reference to the Transvaal.)

[*Contributed by* Gilbert Stone, Esq.]

The law of mines in South Africa is in the main the creation of numerous statutes which create a system which has proved admirable in practice and which is distinct from that of any other country. Many of the principles of the law are, however, not dependent for their existence upon the various Gold and Diamond Laws, but are to be discovered only by an examination of the Common Law of South Africa, especially that branch of it concerned with real property.

The real property law of South Africa, based as it is upon the Roman Dutch system, differs *toto cælo* from that of England, and as regards certain parts has departed somewhat from the principles worked out by the Courts of Holland, for, as De Villiers C.J. remarked in *Henderson and another* v. *Hanekom*[1]:

> However anxious the Court may be to maintain the Roman Dutch Law in all its integrity, there must, in the ordinary course, be a progressive development of the law keeping pace with modern requirements. In no department of law has this development been more marked than in the practice relating to leases, especially of mineral rights.

Not only does the law differ in some respects from the law of Holland, but before the Union there was a tendency for different decisions to be arrived at on the same point in different States. A notable example may be found in the conflict which occurred on the question of *causa*, or consideration. and the length of time necessary to cause a lease to be regarded as a lease in *longum tempus*.[2]

[1] [1903] 20 S.C. Cape 513, at p. 519.

[2] The first of these points may perhaps be regarded as settled by the Privy Council in *Jayawickreme* v. *Amarasuriya* [1918] A.C. 869; 119 L.T. 499. It should be observed, however, that that case was an appeal from Ceylon, and the South African authorities were not considered. See for the South African views, *Mtembu* v. *Webster* [1904] 21 S.C. (Cape) 326; *Boshoff* v. *Lotter*, Broome's Dig. 74; *Waller* v. *Wolder*, 9 S.C. (Natal) 55; *Cawood* v. *Lane*, 5 Searle 264; *Midgley* v. *Tarrant* [1885] 5 E.D.C. 57; *Gous* v. *Van der Hoff* [1903], 20 S.C. (Cape) 237; *Alexander* v. *Perry* [1874] Buch. 59; *Malan & Van der Merwe* v. *Secretan, Boon & Co.*, Foord 94; *Shaw Bros.* v. *Kruger & Elseworth's Executrix* [1899] 13 E.D.C. 188; *Hansen & Schrader* v. *Quirk* [1885] 5 E.D.C. 35. Contrast *Rood* v. *Wallach*, 21 S.A.L.J. 137; *Louisa* v. *Van den Berg*, 1 Menz. 471; *Jacobson* v. *Norton*, 2 Menz. 218. The second of these points was the subject of consideration in *Canavan and Rivas* v. *New Transvaal Gold Farms, Ltd.* [1904] T.S. 136.

It is of course impossible to consider in this article even in outline the various forms of holding of lands in South Africa. The kinds are numerous. There is found a form of freeholding; a quit-rent tenure, the *erfpacht*; a holding involving commonage rights; a limited holding for life, the *lyfpacht*, or usufruct; and a leasehold system. But it is possible and may be of interest to indicate the nature of the prospecting and mining contracts and grants or transfers which are so common in South Africa.

The Theory of Dominium.—In principle, and subject to important modifications due to the various Gold and Diamond Laws, the owner or *dominus* of the surface of land "is the owner of the whole of the land and of all the minerals in it; he is the owner of what is above and what is below."[1] But though this be so the Roman Dutch lawyers have never developed the theory of *dominium* so as to permit of the severance of the holdings horizontally. It is consequently not possible under the South African system for A to have ownership of the surface and for B to have ownership of the subjacent minerals *in situ*.[2] It follows that layers of the earth's surface cannot, as in England, be separately owned, and that strictly speaking there can be no cession or lease of the minerals. The so-called lease of mineral rights is really a grant of a quasi-servitude,[3] for, as was pointed out by Innes C. J. in the Coronation Collieries case, "every grant or reservation of mineral rights is in truth the constitution, by the *dominus* of the property affected, of a quasi-servitude in favour of the grantee."

The Law of Support.—But although there is here a capital distinction between the law of mines in South Africa and in England the law of support in the two countries is substantially the same subject to such special considerations as are present in the case of diamond mining under the claim as distinct from the mine system. Thus the right to vertical and lateral support is recognised as a natural right of property,[4] and, apart from statute or custom to the contrary, an owner who leases land for mining purposes is entitled to lateral support for his unleased portion unless it is clear from the lease that this *prima facie* right has been relinquished.[5] Where, however, the surface is not in its natural state, as where its weight has been increased by a building or other erection, or its self-sustaining power has been weakened by an excavation, it is doubtful whether a right to support does or does not exist as a

[1] Per Mason J., *Rocher* v. *Registrar of Deeds* [1911] T.P. 311, at p. 315.

[2] Per Wessels J., *Neebe* v. *Registrar of Mining Rights* [1902] T.S. 65, at p. 85; cf. *Le Roux and others* v. *Loewenthal* [1905] T.S. 742, at p. 745.

[3] Per Bristowe J., *Coronation Collieries* v. *Malan* [1911], T.P. 577.

[4] *London and South African Exploration Co.* v. *Rouliot*, 8 S.C. (Cape), 74; *MacFarland* v. *De Beers Mining Board*, 2 H.C.G. 398; *Coronation Collieries* v. *Malan* [1911] T.P. 577; *Simmer and Jack Proprietary Mines, Ltd.* v. *Union Government* [1915] A.D. 368 (on appeal [1918] A.C. 600); *C.S.A.R.* v. *Geldenhuis Main Reef G.M. Co. Ltd.* [1907] T.H. 270.

[5] *London and South African Exploration Co.* v. *Rouliot, supra.*

right of property, or whether it can only be acquired by grant, reservation, or prescription.[1] Under the law of South Africa, as under the law of England, a grantor is not at liberty to derogate from his grant.[2]

Lateral Support.—Owing to the form which diamond mining took when first developed in the Griqualand West fields whereby the various claim-holders operating under licence or lease from the owner of the land dug down by open working from the surface and operated in restricted claims, many of which were grouped together, so that many separate diggers would be working almost side by side, it was early held that the principle of lateral support is not applicable to claims worked in such a manner in a diamond field.[3] In *Griqualand West Diamond Mining Co., Ltd.* v. *London and South African Exploration Co., Ltd.*,[4] De Villiers C.J., commenting on Murtha's case, said: "I understand the decision in that case to go upon this ground: a person who proposes to be a miner enters into an implied obligation with other miners, and by reason of so professing is bound to work down." If therefore A works down speedily and B is dilatory, so that A causes B's claim to subside partly into his, A's claim, A is not liable to B, but B is to A.[5]

Usufructuary.—The position of the usufructuary is entirely different from that of the life-tenant in English law. The rights of usufructuary were worked out by the Roman and Roman Dutch lawyers at a time when men believed that many minerals grew and reproduced themselves. Consequently the Dutch Courts adopted a rule partly founded on the principle that the usufructuary could make use of those minerals which fell within the group *renascentia*, while in the case of minerals *non-renascentia* the usufructuary might work the mines, but he could only enjoy the interest on the proceeds of their produce.[6] It will consequently be obvious that the distinction between open and new mines, so important in English mining law, does not arise in South Africa.

Rights of Claim-holders.—As the Privy Council indicated in *Union of South Africa* v. *Simmer and Jack Proprietary Mines*,[7] the Gold and Diamond Laws show that the scheme of legislation was to create or recognise mining rights, exercisable under a system of licence or control which were not dependent on the possession of full rights of ownership in the ground worked, but were to be reconciled with the concurrent ownership rights of others. As Wessels J. pointed out in *Neebe* v.

[1] See *Coronation Collieries* v. *Malan* [1911] T.P., at p. 591, where the English view was followed; contrast per Morice J. in *Johannesburg Board of Executors* v. *Victoria Building Co.* [1894] 1 Off. Rep. 43, at p. 46.

[2] *Witbank Colliery* v. *Malan* [1913] T.P. 836; *Coronation Collieries* v. *Malan, supra.*

[3] *Murtha* v. *Von Beek* [1882] 1 Buch. A.C. 121.

[4] [1883] 1 Buch. A.C., at p. 257.

[5] *Leo, Kennedy and Murray* v. *Ramsbottom* [1881] 1 Buch. A.C., at p. 46.

[6] See per Wessels J. in *Master* v. *African Mines Corporation, Ltd.* [1907] T.S. 925, at p. 930.

[7] [1918] A.C. 600.

Registrar of Mining Rights,[1] when speaking of the Transvaal Gold Law of 1898: "The Gold Law has not entirely abrogated the Common Law, but it has modified it to the extent of giving to the State the right of disposing of the precious metals. . . . The State confers the *privilegium* of extracting minerals from a certain area upon the person who takes out a licence."

The nature of the relationship created by the State and the claim-holder has been the subject of consideration by the Courts in nearly all the countries in which the claim system exists, and the results arrived at are very diverse. In South Africa the contention that the claim-holder is in the position of either a lessee or an *emphyteuta* has been rejected, and it may be regarded as settled that the tenure under which claim licencees hold is one *sui generis* specially created by statute, and the incidents of such tenure must be gathered from the terms of the statute which establishes it.[2]

A lessee of land who is also a claim-holder is not the owner of the claims, though he may fall, within the definition of owner contained in the Gold or Diamond Laws. What he owns is the servitude, *privilegium*, or right to dig for and take the minerals.[3]

Transvaal Gold and Diamond Laws.—The rights conferred upon the claim-holder by the Precious and Base Metals Act, 1908 (Transvaal), and upon the lessee from the Government by the Transvaal Mining Lease and Mineral Law Amendment Act, 1918, appear, however, to be extremely wide and sufficient. The principal Act of 1908,[4] which has been amended not only by the Act of 1918 above-mentioned, but by Acts of 1910, 1911, 1913, 1915, 1917 (3), and 1919, as well as by various proclamations which vary and add to Schedule III, relates to both the precious and base metals mining; the mining for precious stones being

[1] [1902] T.S. 65, at p. 85.

[2] *Bezuidenhout* v. *Worcester G.M. Co.* [1894] 1 Off. R., at p. 251, per Kotzé C.J.; *Neebe* v. *Registrar of Mining Rights* [1902] T.S., at p. 80, per Innes C.J.; *Colonial Government* v. *London and South African Exploration Co.*, 3 Juta 344.

[3] *London and South African Exploration Co.* v. *Bultfontein Mining Board* [1889] 7 Juta, at p. 49.

[4] Previous laws relating to mining for precious metals in the Transvaal are No. 5 of 1866; No. 1 of 1871; No. 2 of 1872; No. 1 of 1883; No. 8 of 1885; No. 10 of 1887; No. 9 of 1888; No. 8 of 1889; No. 8 of 1890; No. 10 of 1891; No. 18 of 1892; No. 3 of 1893; F.V.R.R. 313 of 1893; No. 14 of 1894; No. 19 of 1895; No. 21 of 1896; No. 15 of 1898. No. 22 of 1898 was the first separate Diamond Law, the Diamond Law, until the repeal of Law No. 21 of 1896 by Law No. 15 of 1898, having been part of the Gold Law. For two months in 1898 there was no law relating to mining for diamonds. See *Williams* v. *The Premier (Transvaal) D.M. Co. Ltd. and another* [1910] T.P. 811. Base metal mining was controlled by the Base Metals Law No. 17 of 1895, replaced by No. 14 of 1897, which was amended by Ordinance No. 42 of 1903. The F.V.R.R. Art. 1975 of 1898 dealt with the lapsing of base metal claims. Subsequently by the Precious and Base Metals Act, 1908, these enactments, together with the Brick-making, Lime-burning and Quarrying (Proclaimed Lands) Ordinance 1905, were repealed and the mining for base metals, etc., made part of the Gold Law.

controlled by the Precious Stones Ordinance 1903, as amended in 1904, 1908, 1917, and 1919. The general trend of the Gold and Diamond Laws has been to give the State more and more control both over mining operations and over surface rights.[1] The regulation of mines as regards safety and health is the subject of another series of Acts which culminated in the passing of the (Union) Mines and Works Act, 1911.

Gold Law.—The general scheme of the gold law appears to leave considerable freedom to private persons to prospect their own lands and to the public to prospect generally under permit or licence. Provisions exist which enable the State to reward the discoverer ; to recompense the owner or the holder of mineral rights whose interests are affected by proclamation ; to proclaim public diggings where there are reasonable grounds for believing precious metals exist in payable quantities on the land in question, but not so as to prevent the proper commercial exploitation of the area by restricting development or by excluding the possibility of large scale undertakings, which are encouraged by the State lease system as improved and extended by the amending Act of 1918.

Under the Gold Law the normal sequence of events in (1) private prospecting or prospecting under permit ; (2) discovery ; (3) selection of *mynpachts* ; (4) reservation of owners' reservations and native locations ; (5) proclamation of the area a public digging ; (6) the pegging of claims ; (7) the putting up of mineral leases to tender. A prospecting licence under the Gold Law is a " mining title " and entitles the holder to peg claims ; a prospecting permit is not a mining title and entitles the holder to prospect generally, or, if he peg a specific area, exclusively as regards such area. It is similar to the prospecting licence of the Diamond Law. The claim licence of the Diamond Law is in turn similar to the prospecting licence of the Gold Law.

A prospecting permit under the Gold Law may be obtained by any white person of the age of sixteen years or upwards ; it lasts for twelve months, and, generally speaking, entitles the holder to prospect on any land open to prospecting. Under the Diamond Law the age limit is eighteen and the area is anywhere except certain defined areas or any place expressly excluded by notice from prospecting.

On a discovery being made written notice is required, accompanied by a declaration giving the necessary particulars of the nature of the discovery. Beacons must also be erected. Investigation may then be made, and if it is found that the discovery is genuine and that there are reasonable grounds for believing that metals exist in payable quantities, the prospector may peg certain claim areas free and receives a discoverer's certificate. The discoverer now has the exclusive right of prospecting

[1] The right of the Crown to minerals is the subject of a number of Acts as well of s. 1 of the Precious and Base Metals Act, 1908, and s. 3 of the Precious Stones Ordinance, 1903. See *e.g.* s. 22 of the Land Settlers Ordinance, 1902 ; s. 28 of the Settlers Act, 1907 ; ss. 122 and 123 of the South Africa Act, 1909 ; s. 5 (5) of the Townships Amendment Act, 1908.

and mining free of charge on the area pegged for three years; after that period has expired his claims become ordinary claims.

Under the Diamond Law the discoverer obtains in the case of a mine the right to one-tenth share, but if the discovery is made on private land and such land be proclaimed the discoverer's rights appear to merge in those of the owner.[1]

Under the Gold Law when a discovery has taken place the holder of the mineral rights has the right to select a *mynpacht*. *Mynpachts* occupy no place in the Diamond Law. The holder of mineral rights, instead of selecting a *mynpacht*, may agree to abandon this right in return for a portion of the Government's share of profits under section 5 (I) (*b*) of the Act of 1918 or for other agreed consideration. When selecting his *mynpacht* the holder of the mineral rights may apply for a grant of a lease of the under-mining rights of an additional area of the ground which is contiguous to the *mynpacht* and which will be worked in conjunction therewith. A *mynpacht-brief* is a document evidencing the right exclusively to prospect and mine within the *mynpacht* area.

Public Field System.—Upon proclamation of a public field the owner of the land included therein has the right to reserve certain areas and certain rights in respect of water. In the case of diamond-mining on the proclamation of a mine the owner of the land receives one "owner's share"; in the event of a proclamation of a place as an alluvial digging he receives so many "owner's claims" free.

The form proclamation and de-proclamation take is similar to that pursued in other countries which have the public field system. On proclamation the Governor obtains the right under the Gold Law either to throw the whole area open to the pegging of claims (subject, of course, to certain limitations, as e.g. in the case of owner's reservations); or to lease the exclusive right to mine any portion; or to establish a State Mine upon any portion.

Pegging of Claims.—Elaborate provisions exist relative to the pegging of claims. Pegging is done in virtue of a prospecting or claim licence. As soon as use is being made of machinery for the crushing or treatment of ore obtained from a claim or a claim has been sufficiently developed to permit the extraction of ore therefrom a digger's licence is required. A portion of the money received in respect of licences is paid to the owner if private land is involved. In the case of diamond-mining a digger's certificate and a claim licence are required before pegging can be effected. A digger's certificate is substantially a certificate of character and is commonly obtained from a diggers' committee.

State Lease.—The system of state leases, which at first was not an entire success according to the evidence given before the State Commission in 1917, has recently been to a considerable extent recast by the Act of 1918 and is too elaborate to outline here. The most essential

[1] *Williams* v. *Premier D.M. Co. and another* [1901] T.P. 811, at pp. 821, 822–4.

part of the scheme appears to consist in the selection of areas by the State Mining Department as areas which can be conveniently worked on the large scale, and these areas are put up to tender, the tender being accepted which offers the best return to the State and the best development of the mineral resources. Combines tend to restrict the amount of competition in tendering.

The payments due to the Government in return for the right to prospect or mine are somewhat diverse and have been the subject of substantial modification within recent years. The fees and licence moneys payable in respect of prospecting permits and licences and diggers' licences are small in amount. Under the lease system a share of profits is required by the State. Mining taxation was formerly the subject of a number of laws which culminated in the Mining Taxation Act, 1910, but these have now been repealed by the Income Tax (Consolidation) Act, 1917.

The old 1 per cent royalty on base metals mined is no longer in operation, but, of course, royalties may be and usually are reserved in private mineral contracts. Special war levies were charged on the gold-mining industry.

In the normal case the mining lessee operating by virtue of a state lease has to pay (*a*) a share of profits ; (*b*) a rent ; (*c*) the sum due by way of taxation in accordance with the law in force relating to taxation on mining profits ; and (*d*) $1\frac{1}{4}$ per cent. of $(a) - [(b) + (c)]$.

In the case of leases or contracts made under the provisions of section 52 of the Act of 1908 the liability is somewhat different. Elaborate provisions exist relative to surface user, water-rights, and trading stands. In the case of proclaimed land a permit must be obtained in order that the right to use the surface of such land may be perfected. In such cases the Minister of Mines may in his discretion prescribe that a rental for such use shall be paid to the Mining Commissioner and may fix such rental. No dues or licence moneys are payable in respect of the water rights, which must be obtained before any person operating in a public digging may use any water in any river, stream, water-course, or water-furrow. The extent of the rights conferred depends upon the terms of the water-rights granted.

BALTHAZAR AYALA AND HIS WORK.[1]

[*Contributed by* W. S. M. KNIGHT, ESQ.]

AMONGST those to whom Grotius particularly refers as precursors of his in the exposition of the Laws of War is Balthazar Ayala, the author of *De Jure et Offiiciis Bellicis et Disciplina Militari*. This work, for long very rare, has now been made more accessible to the interested public by its inclusion in the classics of international law which the Carnegie Institution of Washington has been republishing during the past few years. As so republished it is presented in imposing and handsome form in two large-paper volumes. The first volume is a photographic reproduction of the Latin text of the first edition of 1582, to which is prefixed an introduction in English by the late Professor Westlake, the second being an English translation of the Latin text, specially made for the series, by the late Dr. J. Pawley Bate. The introduction describes Ayala and his work so well that those few pages alone are sufficient reading for all save those who, for some special purpose, must acquire a first hand and exhaustive knowledge of the text itself. And this latter task Dr. Pawley Bate made possible to anyone who can read English. His translation is always accurate, and, moreover, its style is singularly easy. And yet it is not the scholarship and art of the translator that compel admiration so much as his infinite care and patience in dealing with a text replete with obscurities and even other greater difficulties.

Estimates of Ayala.—It is doubtful if this work would ever have been republished in these modern times if it had not been for the reference to its author by Grotius. And without that reference it is highly probable that the name of Ayala, still more certainly his work itself, would have been almost entirely unknown at the present day. But as it is he and his work have succeeded, by fortunate chance, in achieving something of immortality. He is, accordingly, "the most illustrious Spanish lawyer of his age," in the view of Lecky, and, if we accept the opinion of Hallam, who actually sets out the contents of his work *in extenso*, that work is "the opening" of international law. Modern specialists, however, are more restrained in their appreciation.

[1] *Balthazaris Ayalae J.C., et Exercitus Regii apud Belgas Supremi Juridici De Jure et Officiis et Disciplina Militari Libri III*, edited by John Westlake, LL.D., with a translation into English by John Pawley Bate, LL.D. 2 vols. 4to, XXVII, 226; XII, 50. Carnegie Institution of Washington, D.C., U.S.A., and Oxford. Humphrey Milford, the University Press, 1912.

Westlake finds in him little or nothing that is original—" learning is first and the thought second," and in this thought there is nothing remarkable, for it " ran on the lines which had been handed down for many ages and demanded no rearrangement of the traditional sign-posts by which its course was marked out." And Professor Holland, treating of the precursors of Grotius, finds no need specially to characterise either the man or his work when noting and describing the volume now under notice. And the specialists are nearer the truth. Ayala has value as a compiler, digesting part of the great mass of scholastic learning on his subject, rather than as an original thinker. It might be urged, too, that he is entitled to some special distinction if only because he did not write more than this one book—a circumstance highly remarkable in an age of most voluminous authorship. But for this there is conclusive explanation and excuse. He died comparatively young, only two years after the *De Jure* was published. It is probable, too, that he lived essentially a practising lawyer, a man of action, rather than one of the study and midnight oil. But his book had a quite substantial vogue in its day, and its author some celebrity, for in 1597 it attained a second edition, and at the commencement of the seventeenth century his memory was already being preserved by the inclusion of his portrait in a collection of eulogies of illustrious Belgian authors. Yet he was never by any means " the most illustrious Spanish lawyer of his day," or anything like it.

His Life.—Of his life there is very little known. He was born at Antwerp, in 1548, his father being a merchant there of somewhat distinguished Spanish family, his brothers and other relations holding important positions in the public service of Spain and the Netherlands. He himself, after study at Louvain, where he was probably a contemporary of Cornelius de Groot, the uncle of Grotius, graduated in law, and, in 1580, was appointed to the responsible position of military judge to the Netherlands military force of the Prince of Parma, and made a member of the Great Council in 1583. His book was written in 1581, published in the following year, and he died in 1584, nearly eighteen months after the birth of Grotius.

His Book.—The *De Jure* is divided into three books, the first alone being concerned with the laws of war regarded as a subject of international law. The second book relates more to politics and strategy, and the third treats almost exclusively of what is now known as military law. In the first book the subject is discussed in nine chapters, namely, on declarations of war, just war and just causes of war, duel, hostages and reprisals, capture and postliminy, keeping faith with an enemy, treaties and truces, deceits in war, and the law of ambassadors. If, however, we have regard to what is said as to sovereigns and their rights, as well in the second book as the first, and, amongst other topics, to treaties and ambassadors, there is much in this work that would be matter for treatment in modern works as part of the international law of

peace. But, on the whole, it is clearly the production of a military judge and counsellor, whose attention is ever engrossed with the practical questions that arise, or are likely to arise, either for his determination as judge or for his opinion as counsel.

Sources of his Work.—Already such a book as this had been published, and that less than twenty years before, by one who was also a military judge—though in Italy—in the armies of the King of Spain. We refer to the *de re militari et de bello* of Pierino Belli, which Ayala would seem to have had in front of him when composing his own work, though, as a fact, he refers to this his "precursor" on two occasions only. Yet in no sense was Ayala a mere follower in the footsteps of Belli, or of the Italian school of writers upon the laws of war of which that author was then the latest important representative. More apparent, indeed, is his dependence upon the civil and canon law, and the fathers and commentators who are summed up by St. Thomas Aquinas, and the later theologico-juridical school, known generally as scholastic, of Lupus, Arias de Valderas, Vitoria, Alvarez Guerra, Soto, Gines de Sepulveda, Vasquez Menchaca, and Covarruvias. And this dependence was as real as apparent. This school was then, and had been for about a century, completely Spanish, and, for at least another fifty years, would so remain, with Suarez as its now best-known name. As Spaniard, as judicial officer in the armies of Spain in the Netherlands, it would be impossible for Ayala to be other than the product of the Spanish jurisprudence of war—ethically as enlightened and liberal in its endeavour as any the world has known. But Ayala was no merely theological scholastic, in the conventional sense of the term, either in his matter or his method. Louvain, his alma mater, might alone account for this, though there scholasticism was the dominating philosophical influence.

Influence of Louvain.—It was at Louvain that Gabriel Mudæus, one of the glories of Belgium's academic past, had been teaching law, for some sixteen years, until his death in 1560, but a year or two, most probably, before Ayala entered upon his legal studies there. Mudæus, a daring innovator as jurist, had succeeded in introducing a critical and systematic method, scientific, literary, and particularly historical, which exercised a profound influence upon the future law studies of the university. Educated at Orleans, when that university was at the height of its glory as a centre of legal teaching, Mudæus had imbibed the humanism which, especially through the work of Alciat, Cujas, Baudouin and Hotman, was to recreate jurisprudence in Europe. For many years there was a struggle between Mudæus and the authorities of Louvain before he was permitted to teach this new method. Success, however, came in the end. Scholasticism, then as to-day in the Neo-Scholasticism of the same university—this latter the special care of that heroic champion of international right, Cardinal Mercier—discovered and insisted upon the fact that its basis was wide enough to embrace all human knowledge and encourage all true intellectual effort and progress. And the success

was clearly justified. The new method could produce not only the ardent Romanists, Cujas and Favre, but also a Hotman, who risked his life and died in poverty for the cause of Reform, the implacable Gallican Dumoulin, and our merely conservative Romanist—though not, one concludes from his work, at all bigoted—Balthazar Ayala.

Historical School.—"Accordingly," he writes, in his dedicatory letter to the Prince of Parma, "I have thought it a work worth doing, so far as my legal studies and historical reading enabled me, to describe how so great military glory was earned, as regards the men and methods employed and the kind of discipline resorted to. The result will show that men's qualities are the same now as formerly and that the chances and occurrences which befall us from day to day are the same as befell men formerly; so that it will not be difficult for one who ponders with diligence on things of old and examines them with judicial deliberation to employ the past—appropriate task for a wise man—in judging the present, in foretelling the future, and in educing from old examples remedies fit (because of the similarity of the circumstances) for modern ills.

And the principle involved in this design is never lost sight of throughout the work. On the contrary, history, almost quite in its modern sense, has so imposing a place, comparatively to that of the sources and methods of the Italian school and the old scholastics, that Ayala may quite reasonably be hailed as one of the earliest adherents of the historical or positive school. Save for references to the Canon and Civil Law, to the Roman historians, and, of course, to Cicero, Bodin is drawn upon for principles and illustrations most frequently, so that, quite certainly, he and his method may be regarded as having exercised a profound influence upon Ayala. Nevertheless, the conservatism of Ayala is such that his historical sense is so very strongly biased that he cannot avoid reference to the days of classical antiquity as of those of a perfect or golden age. What is required, he says, is—

"not the matching of a new truth with an old one, but the adoption of such new measures and principles as [are] conformable to the old ones." And so, "when, owing to the far-seeing counsel of men of wisdom, matters [are] adjusted to the standards of olden times and harmonised with the institutions of their forbears, and everything [is] put back into its proper place, the evil [begins] to abate and the well-being of days of yore [begins] to return." He regards "the expediency of frequently revising the laws and enactments of ordinary civil society and of shaping them to the model of old institutions" as "admitted."

In particular, his aim is "the restoration of the worship of the true God," and "the re-establishment of the sovereign authority of the king (due to him both by divine and human law)." And he makes this declaration, it must be noted, as a military judge in the Netherlands armies of Philip II, opposed, as such, to the armies of the revolution. He, though humanist, is, when he talks of "the worship of the true God," the official advocate of the Catholic Church and that mediæval principle that communion with that Church is the criterion of citizenship,

opposing himself utterly to the then latent principle of the revolt that would entirely dissociate religious obligation from the idea of citizenship. So, too, he boldly confronts the rising principle of nationalities with the old, though still dominating, principle of sovereignties. His aim is that—

> the subversion of all things human and divine which has been brought into the Low Countries may by God's aid be checked and at last ended, and that the whole of the Low Countries may be restored to their former happy state.

A little over a year after this was published Grotius was born—in the camp of that same revolution. A generation was to pass, and it would be only because of a casual reference to his name by Grotius—an outstanding figure in that revolt—that Ayala would himself be borne in memory by posterity. Such is the irony of circumstance. And Grotius was to be acclaimed by succeeding generations as a founder of a most important part of a new political philosophy, consonant with the new ideas of which that revolution and its fruit were for long to be the most perfect expression, while those which Ayala so conscientiously expounded were destined, within half a century, to expire, doomed to oblivion, in a political blind alley; as it were, with the disappearance of Spain as a dominating world power.

The reasons which Grotius himself afterwards gave for writing on the law of war are used by Ayala—that recourse is had to arms by Christian nations "for slight reason or no reason," and, when once arms are taken up, "all reverence for divine and human law is thrown away." So, deeply deprecating this, his object was to bring the practice of war, in these respects, within the rule of right. The only occasion on which Grotius seriously criticises one of the earlier writers on his subject is, therefore, singular, to say the least, inasmuch as he states that Ayala "did not touch the grounds of justice and injustice in war."[1] It is difficult to understand how Grotius could have written this.

Just Wars.—In reading Ayala one is immediately and most forcibly struck by his profound concern for this very point. It is touched upon in his dedicatory epistle, is the main burden of his preface, and is, moreover, the leading subject in one of his longest and most important chapters. In this relation he warns his prince, on the first page, lest "lust and pride usurp the place of self-restraint and fair dealing." He combats most strenuously the idea that "war cannot be waged without violation of right, and that in war there is no scope at all for justice, and that that is right in war which is expedient to the stronger." He insists, with every emphasis, that "there are laws of war just as much as of peace," and that it is only the prosecution of "just" wars that is right. And in the chapter "of just war and just causes of war," he begins by clearly striking his note—"Alike in beginning a war and in carrying it on and ending it, law has a most important position and

[1] *De Jure Belli ac Pacis*, Prolegom. § 38.

so has good faith." Even the subject matter of his second and third books is introduced simply because he regards it as necessarily involved in the question of the "just" conduct of war. He indicates this in his dedicatory epistle, and it at once explains, and to some extent justifies, the inclusion of a great part of that subject matter, even if the work were designedly one of international law as we understand it to-day. And he supports his thesis as to justice in relation to war with a wealth of illustration and evidence and closest reasoning. All, too, is expressed in plainest language, and—sure sign of his practical character and object—in such manner that his conclusions are certain and cannot escape even the hasty reader.

It would, indeed, have been very remarkable if Ayala had not devoted special attention to this subject. He and his work were in the direct line of the scholastic succession, and he himself was writing as an officer of the Spanish monarch's army. And in no literature whatever, not even in that of modern international law, has the subject of just war and just causes of war been more keenly and exhaustively discussed than in the juridico-theological treatises of the scholastic and mediæval writers. Nor, too, has any great Power since been more careful than was Spain in the greatest days of her empire to wage war only when just and only justly. The office of Ayala, as adviser to his prince on this point, was no sinecure, and his book was no merely academic production of abstract interest alone. Never since, in relation to this point, have the opinions of thinkers, theologians, or jurists had the practical weight with their governments that they had, in the age of Ayala and his immediate predecessors, with the rulers of Spain. It may be quite accurately stated that no war was undertaken by Spain even against the heathen of the newly discovered world or against European rebels, without an opinion as to its justice and advice as to its just conduct being first taken, and then, as far as possible, rigidly followed. This book of Ayala was, and was intended to be, a formal justification of the operations of Philip's armies against the revolting Netherlanders, as, some time before, Vitoria, Soto and Sepulveda had advised as to the justice of the Spanish operations against the Indians, and, at a yet earlier period, distinguished theologians had been called upon by the Spanish Government to decide whether war could justly be made against certain rebel peoples of the Philippines, and, if so, how it should be justly prosecuted and ended. To-day such questions are decided by the politicians alone, notwithstanding Grotius and his successors. The jurists and their works may, perhaps, be consulted. It may be doubted, however, whether, when in conflict with political expediency, they have anything approaching the influence and sanction of the old opinions and writings. These latter, based upon Aristotle—who was almost a god—history, the Scriptures, Christian tradition and reason, presented an ultimate composition in which the religious and ecclesiastical element dominated entirely—for Aristotle was

almost Christian too—and enforced the respect even of emperors themselves.

Nor, reading Ayala on this same point, is it easy to discover wherein there has since been any advance in the theory or principles of international morality. Mediæval political philosophy, especially the scholastic, from Legnano to Suarez, has said the last word so far. We read and reread Grotius, and study carefully his successors, until we reach our own contemporaries, and there is nothing to remark in the way of such advance. Only quite recently the world was confronted with the problem of neutrality. With the utmost delicacy and infinite apology some independent minds, greatly daring, ventured to suggest, in the interests of possible permanent peace, that neutrality should cease to be regarded as necessarily a just or lawful status. And this was after more than three centuries of world departure from the international morality of the Middle Ages. Ayala, obscure and ignored representative of the old scholasticism, had actually gone almost, if not quite, as far. There is, perhaps, some reason for a reconsideration of the abandonment of some things of the older world which might, after all, be worthy of modern recognition and development.

The Sense of Justice.—And we might make a beginning by re-reading Ayala. His key-note, as Professor Westlake observes, is the necessity of maintaining justice. And, it may be asked,—Has anything been said or done since his age which has either made clearer and more certain the idea of justice itself or which can indicate that that idea has any increased influence in determining political action, whether that of individuals within a state or of states as between themselves? There can be but one answer. The idea of justice is, and has been during the last three centuries, less certain and clear in the minds of men than at the time that Ayala wrote. Nor, during those centuries, has that idea had—nor has it now—any such increased influence. The civil unrest, the unconscionable class strife, the bloody revolutions of to-day emphatically confirm this view as regards individuals and national affairs. In the international sphere one need but refer to the great war which is not even yet officially ended, the many wars which have already sprung therefrom, the diplomacy and past great wars of the centuries, and the lawless and savage—at times, horrible—licence in almost all these wars. As a fact, a philosophical characteristic of these centuries has been the never-flagging attempt to eliminate entirely the idea of justice from political science, to regard it as a will-o'-the-wisp, an illusion, useful only, if at all, as a rhetorical weapon in the hands of the political opportunist. Modern civilisation, it would seem, has lost the certain principles, and the ideals, and has thrown off the traditions, which did, if nothing more, "maintain," as of necessity, the idea of justice. And now, almost before our eyes, the sense itself of justice seems to be disappearing also. And what is left? There is scarcely one moral philosopher, still less a politician, who will pledge himself

definitely to a certain ethical theory. Nations and classes and individuals now do what pays them best, in their own sight, and scarcely apologise for so doing.

To-day the international jurist must be a "scientist," and proceed according to the methods of the historical school. Ayala, as has been already pointed out, was not only "scientist," a pioneer in the historical method, but also theologian and scholastic, and thus, because of such equipment, jurist in the best sense of that term in his day. If the study of international law had continued in the traditions of the school of the jurists of the class of Ayala, international law, instead of becoming something not unlike an inconclusive historical hotchpot, would have developed into a comprehensive and practical system, based upon a well-defined idea of justice, and exercising upon men and nations a definite and elevating influence, almost irresistible, if only because of a dominating tradition and its intimate association with the highest human ideals.

TRIBAL LAWS OF THE MENDI.

Contributed by LIEUT.-COLONEL C. BRAITHWAITE WALLIS, LL.B., F.R.G.S.]

THERE is no king or other ruler who can claim to be the head of the Mendi; nor is there any paramount chief considered as *primus inter pares* among the chiefs. The nation is divided up into what are called chiefdoms, and each chiefdom forms a unit of the whole. A chiefdom consists of one or more clans occupying a number of towns and villages, and contained within a given area. Every town or village has a chief, sub or minor chief, called *mahawuru*, who is assisted in the work of administration by the elders, counsellors, and speakers, who also have to administer the law. Over the chiefdom presides the paramount chief, or *mahawa*, who is appointed to this position either by the right of succession, by election, or, in exceptional cases, by the nomination of the British Government. Females are not debarred by Mendi law from holding the responsible position of *mahawa*.

The paramount chief is supreme in his own country, but, although his power is considerable, it is not autocratic. Like the sub-chiefs, he is advised by his counsellors and elders, who consist of the free relations of the paramount chief, the principal families, and more wealthy of the free people in the chiefdom. These form the tribal authority, who can vote for and appoint the paramount chief, or sub-chiefs. The tribal authority also includes selected members of the lower or working class, who need not necessarily be freeborn. By the ancient law [1] no alien, or person born outside a chiefdom, can be elected to the office of paramount chief. One of the principal officials of the tribal authority who always accompanies the chief on his travels and attends meetings or palavers, is the *lavari*, or speaker. This man is selected for his standing in the community, for his power of oratory, and for his knowledge of law and of the political affairs of the country. The official meetings of the tribal authority are usually held in large clearings, just outside the most important town, where the paramount chief resides. The meeting or palaver place is called the *korbangi*, which is sometimes formed by two, three, or more towns being built round a cleared space. The speaker, or *lavari*, must always be in attendance on the chief at all these meetings; he is the mouthpiece, legal adviser, and sometimes the brain of the chief. He has to do most of the talking for the chief, who at these palavers usually sits in silence, addressing a few words occasionally to his elders.

[1] This law has frequently been infringed in recent years.

If the subjects of the paramount chief are dissatisfied with his rule, or have any serious charge to make against him, it is customary for them first to bring the matter privately to the notice of one or more of the neighbouring paramount chiefs with a view to their unofficial intervention. Failing a satisfactory settlement, they can complain to the tribal authority of the chiefdom. If the paramount chief refuses to reply to any charge or charges made against him, or refuses to allow such charge or charges to be investigated by the proper authority, or directly or indirectly places obstacles in the way of such investigation, the tribal authority can refer the matter to one or more of the paramount chiefs of other chiefdoms. If, after investigation of the case, by not less than three or more paramount chiefs, the question at issue is decided against the chief, he can, subject to the approval of the tribal authority in council assembled, be deposed or fined, or both. If the action of a person of the status of the head of a family in a chiefdom is complained against, and the matter is brought before the paramount chief, such person can be summoned before the latter, who can fine him. If he fails to answer the chief's summons, he can be sent for and brought before him, tied. Any fine so imposed by a paramount chief on such person can be recovered by distraint on his property, or, failing satisfaction, upon the property of his family. Where a case comes before a Court, and the complainant and defendant fail to produce witnesses, the complainant must swear as to the truth of his statement.

In debt cases, when there are no witnesses, if a complainant swears in open Court on the properly constituted "medicine" that the debt is due from the defendant, the defendant, after a thorough investigation of the case by the Court, will be ordered to pay the debt. Where the defendant swears in turn that nothing is owing, the complainant, in the absence of witnesses, will have to renounce his claim.

Paramount and sub-chiefs are subject to the native laws of their country. A paramount chief has no right to imprison, chain, or detain any member of the tribal authority without trial by the Court. The president of such a Court must be of chief rank.

If any person insults, strikes, wounds, slanders, or acts in a disrespectful manner towards a paramount chief, or sub-chief, and is found guilty of any or all these offences by the Court, he can be heavily fined, flogged, and suffer imprisonment. Formerly he might have been killed or sold into slavery. When the election of a paramount or sub-chief takes place, no chief from a neighbouring chiefdom has the right to witness such election.[1] Where the head of a family, or a member of the tribal authority, interferes with the affairs of the head of another family in a different chiefdom, or a member of the tribal authority in the same chiefdom, which might or does cause a disturbance of the peace, such person can be brought before the chief, or Court, and fined. There is no limit to the amount of such fine.

[1] A very ancient Mendi law which has practically now ceased to exist.

Prior to the British administration there was no limit to the power of the Mendi Courts. They could try any offence and inflict any punishment; and, as their judgments were sometimes contrary to our ideas of morality and justice, the Government had no option but to limit their jurisdiction. They are, however, still a most important agent in the administration of native law and custom in the country, and have full power to try most native cases.

The following are the principal provisions of the Ordinance which dealt with this matter:

Court of Native Chiefs.—The Courts of the native chiefs shall consist of the native chiefs as now existing according to native law and custom; and such Courts shall have jurisdiction according to native law to hear and determine:

(1) All civil cases arising exclusively between natives, other than a case involving a question of title to land between two or more paramount chiefs, or of a debt claimed by the holder of a store licence.

(2) All criminal cases arising exclusively between natives other than (*a*) Cases of murder, culpable homicide, rape, pretended witchcraft, slave raiding, dealing in slaves, cannibalism, robbery with violence, or inflicting grievous bodily harm, or (*b*) Matters or offences related to secret societies, such as human leopard, or alligator societies,[1] or, (*c*) Cases arising out of faction or tribal fights, or (*d*) Matters made offences under the provisions of the principal Ordinance, or any Ordinance amending the same. Provided always that such chief shall in no case be permitted to inflict any punishment involving death, mutilation, or grievous bodily harm, and that the infliction of any such punishment by any such chief shall, in addition to any legal consequences, render him liable to deprivation of the criminal jurisdiction hereby conferred on such chief. Any judgment given by a native chief, who shall hear and determine any cause or matter, whether civil or criminal, other than matters or causes in which jurisdiction is expressly given under the provisions of this Ordinance to the Courts of the native chiefs, shall be void and of no effect. The native chiefs shall be personally entitled to the fees of civil and criminal Courts, and the fines lawfully imposed by them.

In every town in a chiefdom there are one or more court-houses called *barri*, which consist of a thatched roof supported by wooden posts, with thick mud walls, from one to three feet high. A Court can be held in any place within the limits of a chiefdom, and the paramount chief has the right to request any number of his sub-chiefs, or other persons, to sit in Court. There is no law to prevent any man from sitting in a judicial position in such Courts, but a person born in slavery is disqualified if he is still unfree. A slave now free would be eligible to sit. Native law allows for an appeal against the judgment of any Court, although some of the enactments make it difficult if not impos-

[1] This ought to be "crocodile societies," as there are no alligators in West Africa.

sible for a poor man, or a man without influence, to appeal against the decision of a chief or Court. Sub-chiefs, under the jurisdiction of the paramount chief of a country, can, subject to the latter's approval, hear and determine all matters within their jurisdiction. Paramount and sub-chiefs can designate one or more persons, being members of the tribal authority, to represent them on these Courts. Appeals can be made to the paramount chief against the decision of a sub-chief. If the former is unable to decide the matter himself he must refer it to the council of elders, or tribal authority. The paramount chief can quash the proceedings of a Court of the sub-chief, retry the case himself, or order any sub-chief in his country to do so. Such appeals are costly, owing to the fact that in every Court new fees have to be paid. Where a subject desires to appeal against the decision of a paramount chief, or against the decision of a native Court, he has the right to take his case to another paramount chief in a neighbouring country. The latter would then see the former judge, and have a conference with him, and might urge upon him the advisability of modifying or altering his judgment. Or, he could refer the matter to the tribal authority of his own chiefdom, and have the case retried. When a case has been thus retried and the judgment reversed, it is referred back to the tribal authority of the complainant, and the former must go into the case again. Should they disagree with the judgment of the other court, there might, in the old days, have been an appeal to arms if the case was important enough. Now, the matter would be referred to the British Commissioner.

In the event of a dispute between two paramount chiefs, the matter could be heard and determined by a council of paramount chiefs and elders in the country. All proceedings of the Courts are held in public; but during a case the judges have the right to retire for private consultation. In these cases, some of the questions asked by the judges of the Court are often most pertinent, and show that they possess a sound knowledge of the laws of their country. The chiefs are capable of giving excellent judgments when they are not interfered with or corrupted by outside influence. The memory of the judges is sometimes remarkable, for they can recollect, and quote in minute detail, facts and evidence as to events which perhaps took place several years before. The absence of literature is responsible for this, for every man is his own historian. Important events and facts connected with legal cases are committed to memory and handed down from father to son through several generations. The native Courts have a great deal of power in the country, and are capable of unravelling matters and arriving at the real facts of a case where a foreigner might fail. The judges are quick at arriving at a conclusion as to the reliability of witnesses.

Then, again, the nature of the oaths which have to be taken by either side are such that it is safe to say that no native would be willing to swear a false oath upon native "medicine." Oaths are taken upon one

or more of the medicines kept for the purpose by the *tortor-behor*, or "country-fashion man," who has to produce them in Court, where the ceremony of swearing is administered in presence of all. It is to the interest of the *tortor-behor* that the reputation of his medicine should never be allowed to suffer by the indifference of public opinion as to its potency, etc. The complainant and defendant will both swear on one or more of the medicines in Court. Sometimes the form of oath is such that, while in the act of swearing, a part of the medicine or concoction has to be chewed and swallowed. At other times it is simply the holding of a twig or fern or palm in the right hand, taking the oath, and then striking an ancient stone of historic celebrity in the tribe. Such, for instance, is the ancient stone called *Kaikumbar*. When a witness takes the oath upon this stone he will hold a piece of palm-branch, or bunch of leaves, in his right hand, and strike the stone several times while the oath is being taken. The oath will be something as follows:

"KAIKUMBAR, if I swear falsely upon Thee,
If I lie now in this Court,
If I give false evidence,
If I do not tell the exact truth;
Then KAIKUMBAR, Thou deal with me;
May my wife never bear any children,
And if she does, let them die.
When I eat my food, let there be poison in it,
And let it make my stomach swell and kill me.
KAIKUMBAR, When I walk along the road,
Let a snake bite me, and let me die.
When I cross a river, let my canoe upset,
And let a crocodile devour me.
KAIKUMBAR. I swear upon thee,
I swear upon thee,
Before God."

When trying a certain case some years ago, where the evidence of the witness appeared to be unsatisfactory, and where there appeared to be a good deal of perjury taking place, I suggested that the *Kaikumbar* stone be brought into Court for the purpose of administering oaths to witnesses according to the custom of the country. The oaths were duly taken with considerable ceremony, but it was afterwards discovered that none of them were considered binding upon the witnesses, as they had purposely held the wrong leaves in their hands when striking the stone. This was not brought to my notice until afterwards.

Another oath is taken upon red pepper and kola-nuts, which are mashed up and mixed with a little water or vinegar. A witness taking the oath will hold a spoon in the right hand, dip it into the liquid mixture, stir it round and round, then swallow the ingredients. The *tortor-behor* will watch the litigants and witnesses with great care during the course of a case, and, by the time it is drawing to a close, may have

formed a fairly accurate idea as to who is telling the truth, and who is not. If a witness has been bold enough deliberately to lie upon the medicine of the *tortor-behor* he must be punished for it, and it is necessary for the *tortor-behor* to punish him. He may do this by placing, or causing to be placed, a little medicine in his food, which will make him unwell or perhaps dangerously ill. Or he might so arrange matters that some disaster or trouble comes to a member of his family. This would at once be put down to the fact that he has sworn falsely upon the medicine in Court. The oaths taken in legal matters by the Mendi, and other African tribes, are of extreme importance in the administration of justice, for they compel both litigants and witnesses to speak the truth. It is the fear of the danger involved that prevents people from swearing falsely upon these medicines.

When an important case is being tried in Court and the witnesses are being sworn, it is a custom for either side to produce their own medicines; that is, the complainant A will have his own medicine, upon which to swear defendant B, and defendant B will have his medicine, upon which to swear the complainant A, and the witnesses will have to take the oath on the same medicines. Sometimes a chief will compel the medicine-men in Court to swear upon some other medicine to the effect that they will administer the oaths in Court in the correct manner according to law; will allow the medicine to remain in full force upon anyone who dares to break the oath; and will not allow any other person to tamper with the medicine with a view to destroying or modifying its effects. Otherwise the medicine-man might, for a consideration, remove the effect of the medicine. That is to say, when a person is sworn on a certain medicine, and has not spoken the truth, it might be possible for him to bribe the *tortor-behor*, who would cause the medicine to have no effect by some certain mysterious and magic process. It would be immaterial what time elapses between the taking of the false oath and the administration of the poison by the *tortor-behor*, and, no matter how long afterwards it happened, it would be sure to be put down to the power of that particular medicine. It can be readily understood, then, what great power is wielded by the chief and the priests, who are able to play upon the superstitious minds of the people, through the agency of the particular medicines, upon which these oaths are taken.

The laws of the native Courts are different from those of any legal tribunal in Europe, and their procedure may be contrary to our ideas of a fair trial. Nevertheless, these Courts have many times proved themselves capable of just and impartial decisions, and of unravelling the truth; while many of their laws are excellent, and eminently adapted to the requirements of the country. For they have been gradually evolved after countless generations by a people who possess a civilisation and philosophy of their own. The following were some of the punishments inflicted for the infringement of Mendi law, which were rigorously

enforced in the country, prior to the passing of the Protectorate Ordinance :

Murder.—The heaviest fine possible, which might extend to the whole family of the accused. If the fine was not paid it would probably mean death, or certain slavery. If a fine was inflicted it would be sufficiently heavy to ruin the accused, even if he were a wealthy man.

Theft.—Flogging, or placing in the stocks, or both ; the restitution of all property, or its equivalent value. A heavy fine. Enslavement, or, if a bad case, loss of left hand. A subsequent case might mean the loss of the right hand.

Witchcraft.—The guilty could be burned to death, and the whole of his property, and that of his family, confiscated. His family might also be sold into slavery.

Rape.—Heavy fine, and placing in the stocks ; flogging or enslavement, or all three punishments ; compensation to the family or husband of the person raped.

Arson.—Restitution of all property destroyed. Fine, flogging, and placing in the stocks ; and, if a serious case, enslavement of the offender, but not his family.

Assault.—Placing in the stocks for a certain number of days, flogging, or fine ; or all three. In a bad case the offender might be sold into slavery.

When a case has to be brought into Court the complainant goes to the chief, or to his representative, and pays the fee. The fee may be in cash or kind, its amount being assessed according to the wealth and status of the complainant, and to the importance of the case to be tried. When the fee has been paid the chief sends for the defendant. If he ignores this summons he can be brought by force, and may be tied, and is at once charged with contempt of Court and fined. This is known as giving him *kassi* ; and a person guilty of any breach of local custom in Court or elsewhere, would be *kassied*. Upon the appearance of the defendant in Court, the chief, or his representative, informs him of the nature of the charge, and, if he pleads guilty, judgment can be given at once, and the expenses of the Court, together with the fees paid to the chief by the complainant, must be defrayed by him. If, on the other hand, the defendant pleads not guilty, a kind of betting transaction takes place, and is settled before the case proceeds. In this betting transaction the complainant makes a statement to the effect that if he is wrong he will forfeit the whole of the money or goods he is about to place in Court. He then stakes by deposits, which, if they are in kind, often consist of native-made cloths. The defendant has to deposit an equal amount. At the termination of the case the person who wins the action receives the whole of these fees, and not the Court. The defendant has also to pay court fees to the chief of value equivalent to those paid by the complainant.

The case then opens by the speaker, *lavari*, addressing the two parties and the Court. The complainant then makes his statement, but with-

out being sworn, and the Court asks for the names of his witnesses. The defendant also makes his statement, and gives the names of his witnesses. The witnesses play a most important part throughout the proceedings, and they are carefully sworn upon the medicines of either side. The oaths are taken with great solemnity, and with considerable ceremony. The complainant and defendant, and also all the witnesses, usually have to undergo a severe cross-examination by the presiding chiefs or members of the Court. The case is really decided upon the corroborative evidence of the majority of the witnesses, who are called into the presence of the chiefs, one by one. If the evidence of the witnesses is equally in favour of both parties the case would be either dismissed or decided upon its merits.

Judgment is given in open Court, and the expenses of the witnesses are assessed by the Court, each side having to defray the expenses of their own witnesses. These native Courts have done good work in the country. Many of the chiefs not only take a great interest in the proceedings of our own Courts, but have been granted commissions which entitle them to sit in Court as assessors and advisers upon native law. The chiefs have benefited by the example of the patience and skill shown by the British judges in doing their utmost to administer justice to all; and several of them make their best endeavours to try their cases with strict impartiality. They also sometimes request the assistance and advice of the Commissioner in their own legal cases.

Some years ago, while travelling in the Mendi Hinterland near the Liberian frontier, an urgent message was sent to me by an important paramount chief to come and assist him to settle a complicated political case that had been giving considerable trouble in the country. I complied with his request, and joined him at a large town some two days' journey away, where it was arranged his Court should be held. I did not enter this Court in the capacity of judge, but was there simply to give advice to the native judges, if it was asked for during, or upon the termination of, the proceedings.

The case was a dispute between two powerful and important chiefs respecting certain property. Intricate native law was involved, and the dispute had been going on for years. The feeling was so intense between the parties that trouble was feared by the judges, which caused them to send to me to advise and help them. In the old days this case would probably have meant an appeal to arms and perhaps a disastrous internecine war. The case was an interesting one, and was conducted with the utmost decorum, quietness, good form, and order from start to finish. I sat amongst the judges, who consisted of seven paramount chiefs, and the only suggestion I was called upon to make throughout the proceedings was for the removal of one of the judges, who was disqualified on account of his being a near relative of one of the litigants, and consequently having a stake in the dispute. The case lasted for three days, the Court sitting from early morning until sunset, and was

witnessed by a large crowd of interested spectators. There is no doubt that the finding in this Court was in every way just, although the chiefs had no notes with which to refresh their memories. A difficult and complicated case was thus settled by these paramount chiefs in a manner that would have done credit to any European court of justice.

There are three kinds of property among the Mendi :

(1) *Public Property.*—This belongs nominally to the chief as head of the tribal authority, he being the public trustee for it. It is administered through the council of elders.

(2) *Family Property.*—This is shared and owned by the members of a family, the trustee being the recognised and elected head of the family. Should he betray his trust, or prove to be a bad administrator, or misappropriate the money or property belonging thereto, or use it in a manner detrimental to the trust, the sons, daughters, brothers, and sisters of the deceased head of the family have the right to remove such property from the trustee. Or they may hand it over to another member of the family ; or, failing that, such property can be divided up between each member of the family concerned. The trusteeship can also be taken away from the head of the family by order of the Court or chief. When two parents, being the head of a family, die, and where they have also been trustees for any family property, the family in council have the right to elect one or more persons of the same family to look after or hold in trust such estate. If the family is an important one, and the property valuable, it is usual for the family to consult the sub-chief, or even the paramount chief, before finally electing the new trustee. The head of a family acting as trustee before a trustee is appointed is held responsible for any loss or damage to his trust. Property is kept in trust until the sons and daughters are legally entitled to inherit it. Where the head of a family is a brother, who is also trustee, and he dies, or becomes incapable of administering the trust, the brothers and sisters of the deceased have the first claim on the property. They are also responsible for the maintenance, instruction, and custody of his children. Upon the death of all the brothers and sisters of a brother who was a trustee, the eldest son or daughter of the family can claim the property. If a father marries the daughter of his uncle, the eldest son of this marriage has the first claim to the property of his deceased father.

(3) *Private Property.*—This is the private possessions of the individual. It must have been acquired by his own efforts, by gift, or by inheritance. It can be seized for debt, but only after the judgment of the Court. Private property can also be confiscated for crime, including witchcraft, which among the Mendi is the most heinous offence of which a person can be guilty. Persons convicted of witchcraft not only lose their own property, but probably their lives as well. The property of their family would also be liable to forfeit, even if it were not proved to the satisfaction of the Court that they connived at, sheltered, or in any way assisted a member of their family, who was found guilty of it.

INTERNATIONAL CRIMINAL LAW.

[*Contributed by* G. Glover Alexander, Esq., LL.M.]

Criminal law has hitherto formed but a small part of International Law. Such part of it as is recognised at all by International Law falls under the department of Public International Law, and is confined to the subjects of piracy, offences against ambassadors, and similar matters. According to the system of International Law founded by Grotius, it could not be otherwise. Under that system the equality of all States, great or small, forming the Family of Nations, was recognised as the cardinal principle of the whole system, and it gives perhaps exaggerated importance to the subject of nationality and the independence of States. Moreover, under that system, there is no common international tribunal to try offenders, whether such offenders are States or individuals. The consequence of this view is that, with the exception of a few so-called "extra-territorial crimes," *e.g.* piracy, criminal law has hitherto been regarded by us as strictly national and territorial, and most nations or States have exercised criminal jurisdiction only within their own territories, and have jealously guarded that jurisdiction. Of course, each State punishes infractions of its own laws by persons within its territories, whether the offenders are its own subjects or aliens, provided it can apprehend them before they escape into the territory of another State. English Law, it is true, punishes certain offences against International Law, *e.g.* infringements of the privileges of ambassadors, breaches of the Foreign Enlistment Acts, etc. But it does so only to prevent ourselves being embroiled with other nations, and the punishment is administered according to and under our own domestic law. On the other hand, the law of each State has hitherto taken no cognisance of offences committed abroad, *i.e.* outside its territory and within the territory of another State by subjects of that State, being in fact prohibited by Public International Law from so doing. The result is that if a subject of one State commits a crime within the territory of that State, and then escapes into the territory of another State, he cannot be apprehended and punished there, because he is not a subject of that State, and did not commit the offence within its territory or jurisdiction. In modern times, however, influenced by the so-called "comity of nations," and subject to stringent conditions, most civilised States have entered into extradition treaties with each other, designed to secure the return of fugitives, and so avoid the possibility of the non-administration of justice. But apart from such treaties the international position might not unfairly be described, so far as regards

criminal law, as the negation of law and justice. In passing, it may be observed that much more attention has been given to this subject on the Continent than in England, probably owing to the influence of geographical position, and if it be true that it is difficult for foreigners to grasp and understand our legal conceptions and institutions, it is also true that it is equally difficult for us to grasp and understand the legal conceptions and institutions of other countries, and to appreciate them fully, without special training and greater familiarity with the modes of thought and expression of foreign jurists than most English lawyers possess.

International Criminal Law.—It is now proposed to change the position of criminal or penal law, so as to bring it within the pale of International Law. M. Maurice Travers, the distinguished French jurist and author of several standard books on law, has written a work,[1] which is to be completed in three volumes (two of which have already appeared), with this end in view. The first volume deals with *Principes—Règles générales de compétence des lois répressives.* It is a plea for the greater recognition of criminal law in International Law, and its more extended application by the common consent of States, or rather by a group or groups of States.

After an Introduction (*Avant Propos*) in which he deals with the *Définition du droit pénal international et but du présent ouvrage,* he divides the subject into three parts, viz.:

Part I.—*Conception générale du droit pénal international.*

Part II.—*Droit Positif: détermination de la loi au des lois applicables à la répression d'un fait déterminé.*

Part III.—*La mise en œuvre donnée, en droit positif aux règles des conflits des lois et au principe de l'assistance internationale.*

The object of the present work, he says, while including within its scope International Criminal Law, is to determine in the first place the point of evolution attained by the principal legislations, and especially by French Law, then to contribute, in as large a measure as possible, to the rejection of principles which have become obsolete (*surannés*) and hurtful (*nuisibles*).

Present Conceptions of Subject.—But his object is not only destructive. It is constructive, and that in a high degree. He points out that in the past and at the present, the conceptions of International Criminal Law have fallen under one of the four following heads:

1. *Territorialité* (*loi pénale limitée au territoire*);

2. *Personalité active* (*loi répressive suivant le national partout ou il se transporte*);

3. *Personaltié passive* (*loi punissant les faits lésant les nationaux dans leurs personnes ou leurs biens quelque soit le lien de perpétration*); *et*

4. *Universalité*;

[1] *Le Droit Pénal International, et sa mise en œuvre en temps de paix et en temps de guerre, par Maurice Travers, Avocat à la cour de Paris, Docteur en Droit, Lauréat de l'Institut.*

and he proposes the following tripartite grouping of the principal legislations :

1. Those devoted essentially to the system of universality, *e.g.* Austria, Italy, Russia and Norway.

2. Those devoted to the system of territoriality, *e.g.* England and the United States of America ; and

3. Those having a mixed character, e.g. *France, Germany and Switzerland.* But he admits that such classification is arbitrary.

The English View.—England in particular, he observes, is wedded to the territorial system (*Le droit Anglais prend aussi pour base l'idée de territorialitée*),[1] and he cites Archbold on Criminal Pleading (ed. 1905, p. 21) in support of this statement :

Le principe général du droit criminel anglais est strictement territorial et local. Même lorsqu'il s'agit de ses propres sujets, le Common Law anglais ne connait pas des crimes commis à l'étranger ; il y a cependant de très importantes exceptions introduites par la loi.

Example of Difficulties to which Present System gives rise.—As an example of the confusion and difficulty caused by these conflicting systems, he takes the following hypothetical case :

Prenons l'exemple de l'individu qui, placé près d'une frontière, tire un coup de fusil et blesse ou tue un person dans le pays limitrophe.

Il nous paraît difficile de nier que les deux États voisins sont également intéressés à la répression, que l'ordre social est, dans les deux, également voilé.

Les pays où se sont produites les conséquences de l'acte où la victime a été soit blessée, soit tuée, ne peut admettre que, sur son sol, la vie humaine soit ainsi mise en danger.

D'autre part, l'impunité de l'auteur de l'acte produirait dans l'État d'où a été tiré le coup de fusil, l'exemple le plus déplorable.

Proposed Reform.—But how are these principles or systems, which are apparently so well and firmly established, to be changed and harmonised ?

It may be said at once that M. Travers does not propose anything so heroic and unattainable as the immediate establishment of an International Court of Criminal Justice. He leaves to each State the right to administer its own *droit interne.* But he does urge the establishment in each State of one or more *bureaux de renseignements,* and certain *bureaux centraux internationaux,* as a *principe de solidarité ou d'assistance internationale,* and as an improvement (*amélioration*) on the present system.

It is part of the scheme of the League of Nations that there shall be a Court of International Justice ; indeed a workable scheme of such a Court was evolved and determined on at the first session of the League.

[1] Phillimore, *International Law,* ed. par Philipson, 1889, p. 299.

Such a Court will, however, for some time, if not always, be concerned with questions of *la haute politique*, between State and State, and will not deal with the affairs of individuals, unless they become matters of State, much less with criminal matters. And such Court has still to justify its existence, and the hopes of its well-wishers. It is not by such means, for which the world and the times are not ripe, as regards criminal law, that the desired end is to be attained. But he does think that the time is opportune for a great advance in our ideas of criminal law, and its better administration as between the different systems above mentioned. *The chief idea underlying his thesis indeed is that criminal law is not a mere question of States and nations. It has a wider meaning and aspect. It concerns groups of nations, and within these groups it is possible to work out a better system of administration, which would avoid many, if not all, of the difficulties mentioned above, and render it less easy for a criminal to escape justice.* Let us see how he develops this idea. In order to do so, it is necessary to return to his conception of International Criminal Law.

Dominant Idea of International Criminal Law.—To begin with, he observes that the dominant idea of International Criminal Law is, that while every facility ought to be given for the manifestation of truth (*pour la manifestation de la vérité*), and especially for the discussion and refutation of charges (*tout specialement pour la discussion et la réfutation des charges*), every effort ought equally to be made to reduce to a minimum those cases in which the existence of a conflict of laws causes a miscarriage of justice (*de vient une cause d'impunité*) and he asserts that the truth of the evidence is a matter that has frequently been lost sight of, particularly in matters of extradition.

Double Aspect of International Criminal Law.—He points out that International Criminal Law has a double aspect:

Comme le droit international civil ou commercial, le droit pénal international peut se présenter sous un double aspect. . . .

Il peut soit prendre celui d'une disposition de pur droit interne soit revêtir celui d'un accord diplomatique. . . .

Cette dernière forme est la plus parfaite.

Its Essential Characteristics.—He next inquires what are *les caractères essentials du droit pénal international*, and says *ils se deduisent de la nature même du droit pénal (interne)*.

He rejects the ground of *ordre public*, which he says is a vague expression, and also that of defence (*des mesures de défense*) as those grounds are common to criminal law and their legislative dispositions.

The conclusion at which he arrives, as to the nature of criminal law, is:

Le droit pénal apparait ainsi, dans chaque groupement, comme assurant le respect des règles considérées officiellement comme essentielles à la vie et à la prospérité du groupe; c'est, en un mot, au plus haut degré, un droit de défense sociale.

The true basis of *droit pénal (interne)* is, in his opinion, *protection sociale.*

He rejects also the idea of culpability or vengeance.

Droit pénal (interne) is therefore *droit de défense sociale propre a un groupement.*

Its Nature.—Having thus arrived at the nature of *droit pénal (interne)* he proceeds to deduce from it the nature of *droit pénal international*, as to which he lays down four rules, which, he says, form *l'ossature même du droit pénal international*; as to what these four rules are we must refer our readers to the book itself. It is the third of these rules with which we are chiefly concerned, viz. :

La loi pénale d'un groupement étant une loi de défense sociale ne doit pas cesser d'être compétente par cela seul que la loi répressive d'un autre groupement réclame également le droit d'agir ; chaque loi pénale doit accomplir le rôle qui lui est devolu : les compétence législatives se superposent en principe.

It is this third characteristic of *Droit Pénal International* that will give rise to most difficulties, both with lawyers and politicians. Of it he says :

La troisième idée, déduite de la nature du droit pénal, celle de la superposition tout au moins de principe, des compétences législatives concurrentes, imprime au droit pénal international un de ses caractères les plus particuliers.

La Superposition des Compétences Legislatives Concurrentes.—This rule of the *superposition des compétences législatives concurrentes* is the key-note of the whole system, as advocated by M. Travers. It is a new idea, difficult to grasp, and the putting of it into operation (*mise en œuvre*) will, we fear, be still more difficult, but it is an idea that deserves very serious consideration. The term *compétence* seems to mean what we should call " applicability " or rather " cognisability " in our terminology. Perhaps " justiciability " would be still nearer the mark, and the rule may be described, not inaccurately, as the overlapping or over-laying of jurisdictions. The result seems to be that where a crime has been committed, partly within the jurisdiction of one country and partly within that of another, either country (within the group) should have the right to try the offender for the full offence, according to its own laws, as if all the facts had taken place within its own jurisdiction or territory, or rather, independently of territorial considerations altogether.

To take the example given above of a man who fires a gun across a frontier, while standing in the territory of one State, and kills a man in the territory of another State—on this theory of the *superposition des compétences* he could be tried for the murder in the State in which he was standing (and where presumably he would be arrested), although the actual murder was committed in the other State, without any consideration of nationality or territory, and without the trouble and expense of extradition proceedings, assuming they were possible.

Or, to take another example, also given by M. Travers, of a robbery planned in Switzerland, and perpetrated in France, the stolen property being received in England. In such a case the guilty parties could, on this theory, be tried for all three offences of conspiracy, robbery and receiving stolen property in England or Switzerland as well as in France. France already acts on this theory.

But does not this theory itself involve a fiction, viz. the supposed abandonment or abolition of the frontiers that actually exist between the different States? Is it not a case in which (to use the words of M. Travers) *la conception viole ouvertement la réalité?* Elsewhere M. Travers, on this very ground, viz. that they are opposed to reality, resolutely rejects all fictions, of which it must be confessed there are far too many in international law.

Of course, under such a system, it would be necessary to adopt safeguards against the offender being tried twice for the same offence (*pour assurer le respect de la maxime, non bis in idem*), and also to avoid the accumulation of penalties (*à éviter le cumul des peines pour un fait unique*).

The Practical Application of this Rule.—The practical means by which M. Travers hopes to see these ideas carried out, or put into operation (*mise en œuvre*), are not, as has already been said, an International Court or Tribunal, but a Treaty, or series of treaties, between one large group of nations, or several groups, each group, large or small, recognising and binding itself to observe this rule of *la superposition des compétences législatives concurrentes.* This can only be done by *des accords diplomatiques—par des traités, par la cooperation consentie, par la coordination, par l'aide ou assistance internationale—mais toujours par d'accord diplomatique.* In fact, as he says: *L'idée d'assistance internationale domine la mise en œuvre du droit pénal international* (par. 36).

Such a group might conceivably be found in the so-called Allies. But it seems more probable that, if the scheme were adopted, England, the United States and Canada would form one group; France, Spain, Portugal and Italy, another; Germany and Scandinavia, a third; all Latin countries of Central and Southern America a fourth; and so on.

Reduced to its lowest dimensions, the theory or scheme is, that instead of the present chaotic, sporadic system of each nation or State administering its own criminal law within its own territories, with the help of extradition treaties, in the future, the administration of criminal law outside the boundaries or territories of each State shall be undertaken by a group of nations or States, if possible by one large group, not however by means of a common tribunal, but by each State (within the group) in which a criminal is arrested assuming full powers of jurisdiction. This would make a great change in the basis of international law as regards criminal jurisdiction. It remains to be seen how far the different States of the world, with their different systems of law and procedure, and the ever-present difficulty of diverse languages, will adopt it; but the theory is an ingenious and captivating one.

As M. Travers says:

La méconnaissance de ce devoir d'aide internationale, jointe parfois à des particularités de procédure, entraîne des impunités scandaleuses.

International Criminal Law in Time of War.—"*La guerre de* 1914–18 *a attiré de façon toute particulière l'attention sur celles* (*améliorations*) *qui concerneraient le temps de guerre.*"

The German Government and its troops, as M. Travers says, have so constantly and so impudently violated the obligations imposed on them by international treaties and the laws and usages of war that a current of opinion, particularly strong in France, has deplored the suppression of facts of this nature, the creation of special legislation, and an international jurisdiction. The conclusion at which he arrives is:

Malgré les avantages, l'un certain, l'autre douteux, que nous venons de mentionner, l'établissement d'un tribunal international de nous apparait que comme un moyen exceptionnel qui ne peut être mis en œuvre qu'au moment de la paix.

Here we enter the dubious region of politics, and opinions may differ as to the wisdom or otherwise of the establishment of such a Court and its work. But beautiful France lies stricken and still bleeding from the wounds inflicted on her by an unscrupulous foe, and our sympathies are with her. Upon one question we are all agreed: that it is the duty of every good citizen, both as a lover of his own country and as a lover of humanity, to do all that lies in his power, not only by lip-service, but by personal effort, to create a strong, healthy sentiment in favour of peace and the objects of the League of Nations, and so, as far as possible, to prevent future wars.

As to the book itself, the greater part of it is devoted to the exposition of the principles above mentioned and illustrations showing how they would work in practice. Naturally most of the illustrations are drawn from French law and treaties, or other diplomatic arrangements to which France has been a party. A feature of the book is the very sparing use made of German writers and authorities, and the large use made of English and American. Before the war it would have been otherwise.

In the second volume M. Travers continues the *Règles générales de compétence de la loi pénal*, and the exceptions to them, including complicity, indivisibility and connexity. He deals also with the acquisition and change of nationality and industrial, artistic and literary property.

Rejection of the Terms "State" and "Procedure," and the Division into Public and Private Law.—Consistently with the ideas enunciated above, M. Travers is of opinion that it is better to avoid, in this connection, the use of the word "State" (*Nous croyons préférable d'éviter l'emploi du mot État*) though he finds it impossible to do so on every occasion. The better term, we suppose, would be "treaty-group" or "treaty-power."

He also objects to the use of the word " procédure " (*Nous n'employons pas le mot procédure, ce terme serait trop étroit; la compétence, l'extradition rentrent dans cette mise en œuvre*). He rejects the distinction between public and private law:

Cette question est, selon nous, quelque peu oiseuse. Rien n'est plus incertain que la ligne de démarcation qui séparé les dispositions de droit public de celles de droit privé.

These examples afford sufficient indication of his line of thought, and show that the scope of International Criminal Law is wider than that of *droit pénal interne.* Should this idea be accepted and acted on there will be evolved a sort of super-criminal law, which will occupy a position midway between *droit pénal interne* on the one hand, and the so-called public International Law on the other. It might be described as *droit pénal externe.*

The work (or rather the two volumes of it so far published), shows great originality, industry, power of analysis, and learning, and we wait with interest the third volume. When complete it will form a valuable addition to the literature, and, we hope, to the authority, of International Law. It breaks up new ground, it starts a new theory. It enlarges our outlook, and adds to our stock of jural conceptions. The learned author advocates an extended application of criminal law as part of International Law, and advances good reasons for his view. At the same time he does not overlook the difficulties in the way, one of which is, as he says, *la loi pénal est de stricte interprétation.*

In his view, Law is an experimental science, and the precedents of jurisprudence in a work of this kind ought to play the same rôle as clinical observations ought to play in a treatise on medicine. And finally he says, in words which he has prefixed to his book, and which express his method throughout:

Il faut, dans un ouvrage de droit, faire œuvre de sincérité, rejeter toute fiction, toute théorie qui n'est pas strictement conforme à la realité, et ne pas hesiter, en cas de nécessité, à faire face aux besoins nouveaux par des conceptions nouvelles.

THE CONSTITUTION OF ESTHONIA.

[*Contributed by* R. T. Clark, Esq.]

The independent Republic of Esthonia is composed of the former Russian Government of Esthonia, the northern part (to Walk) of Livonia, the western corners of the Governments of Petrograd and Pskov and the adjacent islands. On the north and west it is bounded by the Baltic Sea (Gulf of Finland, Gulf of Riga), on the east by Russia, and on the south by Latvia. With an area of 47,500 kilometers, it contains very nearly 1,750,000 inhabitants, of whom 90 per cent. are Esths, a race akin in ancestry and language to the Finns. Protestantism is the practically universal faith. The Esths have not been free since the day of heathenism. Germans, Danes, Swedes, Poles have all possessed the land as conquerors, and finally Russia absorbed the whole of the race into her Empire. In spite of age-long servitude, the depressing rule of the German landowners (Balts), and intense russification, the Esthonian language and culture not merely maintained themselves, but appreciably advanced, fostering, and being fostered, by that growing sense of nationalism that characterised the two decades before the war. The movement for autonomy was already important when the Russian Revolution broke out. On April 12, 1917, a decree of the Russian Provisional Government provided for local self-government, under a National Council, for the Esthonian districts. This Council (*Maapäew*) met for the first time on July 14, and Esthonia virtually became a federal State in a Russian confederation. On the Bolshevik *coup d'état* of November, the National Council declared itself the sovereign power in Esthonia until a Constituent Assembly could meet. On January 28, 1918, the Balts formally invited Germany to occupy the country, to which the Council, after protesting on February 7, replied on February 24 by declaring Esthonia an independent State, and constituting a Provisional Government under M. Paets. The Provisional Government was dissolved by the German invaders, and M. Paets arrested; but the National Council maintained itself by missions abroad, and was recognised as a *de facto* governing body by Britain (May 3), France (May 15), and Italy (May 29), a recognition amplified by the British declaration of September 10. As soon as the German evacuation began, the National Council resumed power, reconstituted the Provisional Government, and held elections for the Constituent Assembly, which was opened on April 23, 1919, and on May 19 proclaimed Esthonia an independent Republic.

A peace with Bolshevik Russia which recognised the *de jure* independence of Esthonia was signed at Tartu (Dorpat) on February 2, 1920.

Finland recognised the republic as *de jure* independent, and by June 7, *de facto* recognition had been accorded by practically all the Powers.

Organisation.—The first task of the Assembly was to frame a constitution. The work was entrusted to a Commission of fourteen members, representing six parties, and including two ladies. M. Jaan Poska [1] acted as Chairman. A short preliminary constitution—the Organic Law—was drafted, submitted to the Assembly on May 21, 1919, and passed on June 4. It came into force on July 9, and remained in force till the State Assembly elected by the elections of November 27–29, 1920, met.

Draft Constitution.—The Commission submitted a draft scheme to the Constituent Assembly on May 27, 1920, but it was greatly altered in particularly keen debates, lasting until June 15, when it was passed in its present form. The draft had at least the outstanding merit of being short and intelligible, and bears the mark of the politician's handiwork, as well as the jurist's. The Commission spent a whole year on it in genuine hard work, in which they were assisted by the best jurists in Esthonia in exhaustive examination of foreign constitutions, notably those of the United States, France and especially Switzerland. The draft scheme is simply a bold enough attempt at a democratic constitution on conventional lines. It is, in fact, little more than an amplification of the Organic Law of June 1919, and has clear traces of imitation of the constitutions consulted. In its final form, however, it is radically changed, and has several important features of deep interest to the student.

As it now stands, the Constitution contains a preamble stating that the Esthonian people has drawn it up and accepted it through the Constituent Assembly. It contains ten parts (89 Articles).

Part I ("General Description," Arts. 1–5) defines the boundaries of the "independent, autonomous Republic of Esthonia," in which "the power of the State is in the hands of the people," proclaims the supremacy of the Constitution, and declares Esthonian to be the State language.

Fundamental Rights.—Part II ("On the Fundamental Rights of Esthonian Citizens," Arts. 6–26) declares the equality of all citizens, and forbids marks of distinction, guarantees the inviolability of the person and the home, freedom of religion—there is no State religion—and conscience, free (and compulsory) education (with guarantees for racial minorities), freedom of the press, inviolability of correspondence, the gift of petition, freedom of domicile, the right of association, and the right to strike, free choice of nationality, the right of minorities to form autonomous cultural institutions, to use their own language before the organs of local self-government in districts where they are in a majority, and to address petitions to the central authority in their own language, the right of private property, a living wage, adequate economic conditions [2] and the protection of maternity, old age, etc.

[1] M. Poska died on March 7, 1920, and was succeeded as chairman by M. Anderkop.

[2] *Cf.* German (1919) Constitution, Art. 151.

Part III ("On the People," Arts. 27–34) deals with the position of the nation as the governing citizen body. Arts. 27 and 29 are fundamental, and must be quoted:

Art. 27.—The supreme executor of the State power in Esthonia is the people itself, through the medium of citizens having the right to vote.

Art. 29.—The people exercises the State power (*a*) by plebiscite, (*b*) by their initiative in legislation, (*c*) by the election of the Assembly.

The plebiscite clause requires that a law shall remain unpromulgated for two months after the Assembly has passed it, if one-third of the legal number of members requires it so to remain. Thereafter, if 25,000 electors demand a plebiscite, a plebiscite is held, and promulgation or non-promulgation is decided by the result. Twenty-five thousand electors have the right "to require that a law shall be passed, changed or cancelled." The request is submitted to the Assembly, which can either pass it as a law or reject it. In the latter case a plebiscite is held, and if the request receives a majority acquires *thereby* the force of a law. If the people either reject a law passed by the Assembly or accept a law rejected by it the Assembly *ipso facto* is dissolved and new elections held. Only the Budget, some financial measures, declaration of state of siege, mobilisation, etc., are not subject to plebiscite. Plebiscites are conducted under control of the Præsidium of the Assembly.

State Assembly.—Part IV ("On the State Assembly," Arts. 35–56) lays down that "as the representative of the people the Assembly exercises the legislative powers." It consists of 100 members (but can increase that number by a law) elected by universal secret suffrage on the principle of proportional representation. Elections take place triennially. It is governed by a President and Præsidium which it elects; 50 per cent. of the members form a quorum. Members are privileged and salaried. Each member can put questions to Ministers, and 25 per cent. can interpellate, when an answer must be given.

Part V ("On the Government," Arts. 57–67) lays down that "The Republican Government executes the governing Power in Esthonia." The Government consists of the State Head (*Riigiwanem*) and Ministers. The Assembly forms the Government (Art. 59). Their duties are laid down in Art. 60. "The *Riigiwanem*," says Art. 61, "represents the Esthonian Republic, and unifies the activities of the Republican Government, presides over its meetings and is authorised "to interpellate any individual Minister." The Government (Art. 64) must resign on a vote of no confidence being passed.[1] The Government establishes the State Chancery, which is superintended by the *Riigiwanem*, and directed by the State Secretary appointed by the Government. All acts need the signature of the *Riigiwanem*, the State Secretary, and the responsible Minister.

[1] Art. 64 says "the Government or its members," presumably not laying down the doctrine of collective responsibility. Members of the Government, be it noted, are not required to be members of the Assembly.

Courts of Justice.—Part VI ("On the Courts of Justice," Arts. 68–74) says that the supreme judicial power is exercised by the State Court of Justice formed of judges elected by the Assembly. Other judges are appointed by the Court. Judges can be dismissed only by the Court.[1]

Law of Government.—Part VII ("On Self-Government," Arts. 75–77) provides for the creation and election of local self-government bodies. This is a mere adumbration of future legislation intended to institute very comprehensive local autonomy.

Defence.—Part VIII ("On the Defence of the State," Arts. 78–82) provides for the establishment of defence forces on the basis of universal obligation to take part in the defence of the Republic. This will form the subject of legislation.

Taxation.—Part IX ("On the State taxes and Budget," Arts. 83–85) ordains an annual budget and provides against illegal taxation.

Alterations in the Constitution.—Part X ("On the Power of Alteration of the Constitutional Law," Arts. 85–9) declares that this Constitution is "the unshaken rule for the actions of the Assembly, Courts and Government institutions." The initiative of alteration belongs to the people and the Assembly as laid down in Art. 31.

The aim of the framers was obviously a constitution for a fully conscious and advanced democracy, and it is this aim that constitutes the difference, more than terminological, between it and older Constitutions. The first article lays it down that power *is in the hands of* the people, not *is vested in* (Mexican, Art. 39) or *emanates from* (Belgian, Art. 25; German (1919) Art. 1) or *resides in* (Chilian, Art. 3), and Art. 27 declares the people *the supreme executor* of *State Power*. It is the *whole* people, not merely the electoral body, which is merely the medium of expression. The *Riigiwanem* is Premier, but not President, because the electoral body is really the President. It chooses as instrument the Assembly which for its own instrument chooses the Government. In practice the executive power is exercised by the Government, whose head discharges presidential functions. Legislation is initiated by the Government, the Assembly, and the electoral body, the latter by the plebiscite having final jurisdiction. By the initiative, which applies to *all* kinds of laws, a comprehensiveness existing, in Europe, only in some Swiss cantonal constitutions, the electoral body repairs—to quote Professor L. J. Johnson—the sins of omission, and by the referendum sins of commission in its agents. The people actually does legislate, but everything is done to safeguard public security and the stability of the organs of government. Forcing a plebiscite is not an easy matter. The people cannot demand a plebiscite on a bill under discussion. The bill is passed

[1] This is interpreted to mean that the State Court judges are appointed permanently. It is not laid down that the Supreme Court is the ultimate authority, whether a law is constitutional or not. Some Esthonian jurists hold that this is so, but, in view of the silence of the Constitution and the Swiss analogy, the probability seems that no authority is necessary outside the Assembly itself.

and is promulgated as a law, unless one-third of the Assembly requires a two-months' suspension. During that time 25,000 electors [1] must be found to demand a plebiscite by the result of which promulgation or non-promulgation depends. If non-promulgation is carried, a vote of no-confidence is thus carried in the electoral body against the Assembly, which is *ipso facto* dissolved.[2] The initiative procedure demands similarly 25,000 electors. They submit a request that a new law shall be enacted or an old one cancelled or amended. The request, in the form of an elaborated draft, goes to the Assembly, and the Assembly either passes the draft, in which case it acquires the force of a law, or rejects it. If rejected the draft is submitted to a plebiscite, and if it is carried again the Assembly is dissolved. It is thus the duty of the Assembly, when the draft comes before it, to gauge the popular feeling, and act in accordance with it. If, having gauged it, the Assembly defies it, or if the Assembly gauges it wrongly, the Assembly is judged an unworthy instrument of the popular will and dissolution is justified. Dissolution is thus parallel to the Government's compulsory resignation after a vote of no-confidence has been passed, and the control of the Assembly by the people is analogous to the control of the Government by the Assembly. In this very simple control-system a President is out of place. To fit him into the system would require a further elaboration, which, by confusing the ordinary citizen, would weaken his actual grip on legislation, and a President is therefore dispensed with, his routine duties being part of the heavy burdens borne by the *Riigiwanem*.[3]

Conclusion.—This is democracy of an advanced type, and if it invents little that is actually new—the inclusion of the right to strike, even with a D.O.R.A. proviso, is, I think, unique—the Constitution carries into the printed text more of the implication of pure democratic theory than any other, while its rejection of the soviet system shows a stern refusal to stray, even so tentatively as the German Constitution of 1919, out of the

[1] Roughly 5 to 6 per cent. of the electors. In the American States the percentage varies from 5 to 8 per cent.

[2] There is a difficulty here which further legislation on procedure is required to settle. The Government, while it only resigns on a vote of no-confidence being carried, in theory apparently perishes with the Assembly. It does not remain in office after the Triennium, but is reconstituted by the new Assembly as a new Government, even if its personnel is unchanged. This implies a complete absence of organs of government, following a dissolution. The Government, it would seem, must function until the new Assembly comes into existence, *i.e.* at the declaration of election results. The new Assembly meets automatically, for there is no one competent to summon it, and here too amplification is necessary.

[3] This fusion of the offices of State-President and Premier is not exactly similar to the absence of a President from the Communist system, which can dispense with any democratic instrument or institution as easily as could the Thirty Tyrants. It is interesting to note, however, that the programme of the Russian "pàrti travailliste bourgeois" is identical in name with the Esthonian Liberals and, organised in Russia in 1917, foreshadowed in their party programme a Republic without a President. (G. Demorgny: *Les Partis politiques et la Révolution russe*, p. 83.) A similar fusion would apparently have been found in Georgia had that republic continued to live.

strictly democratic path. The great advantage its framers had was that they began *de novo*, and were not cursed, or blessed, with a constitutional past. They have been able to incorporate freely the latest devices of democracy, and interpret in actual words much of the spirit underlying the older Constitutions. But, for success, they postulate as essential conditions a State of no great size in territory or population, a nation imbued with the stern discipline of enlightened patriotism, and an electoral body which is fully educated, which is supplied with, which can and which will, use all sources of information on a question at issue. Happily Esthonia, if it does not fulfil absolutely these conditions, approximates very closely to fulfilment, and we have therefore a good field for the trial of what is a really notable experiment in democracy based on complete confidence in a nation with absolutely no experience in national self-government, and deriving its inspiration from the old time declaration of the constitution of Massachusetts: "All power residing originally in the people, and being derived from them, the several magistrates and officers of Government . . . are their substitutes and agents, and are at all times accountable to them."

NOTE.—The text of the Organic Law is printed in the *Bulletin d'Esthonie*, No. 5. No. 10 of the same periodical contains a full summary of the draft Constitution. The Constitution is printed in the *Baltic Review* (Nos. 2 and 3), September and October 1920. It can, I think, be obtained as a pamphlet. I made a preliminary study of it in the *New Europe* of August 12, 1920. There is no connected account of the new state up to date. M. Martîa's *L'Esthonie* is valuable, but its progress can best be studied in the documents published by the Reval Government or in *La Revue baltique* (1918–19), *Bulletin d'Esthonie* (1919), *The Esthonian Review* (1919–1920), *The Baltic Review* (1920), *Esthonia* (1919: U.S.A.), M. Gaillard's *L'Allemagne et la Baltikum* and Mr. Ralph Butler's *The New Eastern Europe* are useful only because there is nothing else. I should like to express my thanks for valuable help to my colleague, Mr. W. D. Robieson, and to M. Kopwillem of the Esthonian Legation in London, to the latter not merely for much information, but also for consistent kindness and courtesy to a very troublesome seeker after knowledge.

COMPULSORY ACQUISITION OF LAND IN AUSTRALIA.[1]

Purposes of Acquisition.—With the exception of the State of South Australia, all the States of the Commonwealth have empowered the central executives, or in some cases specific *ad hoc* bodies,[2] to acquire land compulsorily for "public purposes." These latter purposes appear to be, though there exists no explicit statutory definition, any purposes which may be authorised by any particular Act to be carried out by any executive functionary or body on behalf of the central Government. In Queensland, Tasmania and Western Australia, a similar power is extended to local authorities incorporated by statute.[3] In the case of Victoria, this general power of local authorities is limited by the necessity of obtaining the consent of the Minister concerned.[4] In New South Wales a similar detailed consent by the Legislature is necessary before a local authority may proceed to acquire land compulsorily.[5] An exception, however, is made in the case of the municipality of Sydney, which may for the purpose of "town planning" and "housing reform" exercise these powers without any recourse to the Legislature.[6]

In South Australia no general power of resumption has been granted. In the case of crown lands under perpetual or any other lease, there is a power of resumption for any public purpose.[7] In the absence of any specific definition of "public purpose" it must be assumed that this also means any purpose authorised by statute. In the case of any other land, a specific power of acquisition must be included in each Act, which authorises any activity necessitating the exercise of such power. This withholding of executive authority is in marked contrast to the attitude of the other States. So far, specific powers of acquisition have been granted for the purpose of the Adelaide Sewers Act (No. 6 of 1878, s. 25), the Water-works Act (No. 269 of 1882) and the Water Conservation Act (No. 392 of 1886), and the Railway Commissioners Act, 1887.

The Commonwealth Parliament has not granted general powers of

[1] Contributed by students of the Law School in the University of Melbourne: Messrs. E. G. Coppel, A. R. Henderson, H. P. Levy, B.A., R. J. Lowenstern, B.A., L. Mann, P. D. Phillips.

[2] *E.g.* Closer Settlement Acts (Vict.), 1915–18. Public Works Act (Vict.), 1915. Public Works Land Resumption Act (Queensland), 1906–16.

[3] Local Authorities Act (Queensland), 1902. Lands Resumption Act (Tasmania), 1910. Western Australia, 2 Ed. VII, No. 47 and Amending Act 6 Ed. VII, No. 8.

[4] Land Act (Vict.), 1915, s. 286.

[5] Public Works Act (N.S.W.), 1912, s. 37.

[6] Sydney Corporation Amendment Act, 1905.

[7] Crown Lands Act (S.A.), 1915, s. 81.

acquisition for any of the purposes which it is empowered to execute under s. 51 of the Commonwealth Constitution.

In addition, however, to these powers, each State has passed several Acts which give a power of acquisition for specific purposes.[1] In most cases these Acts preceded the later Acts instituting the more general powers, and hence there has been a duplication in the granting of such powers to the executive. The Closer Settlement Acts present, however, a particular form of activity, which is somewhat different from the usual " public purpose " and is dealt with separately.[2]

No provision has been made for Closer Settlement in Western Australia. The only peculiar specific power of acquisition in this State is that extending to any land within twelve miles of the route of any new railway which may be constructed.[3]

In Queensland the Closer Settlement provisions are limited to those estates valued at £20,000 or more. The total annual expenditure is not to exceed £500,000.[4]

In South Australia the value of the estate is the same. But no such limitation exists in the resumption for irrigation and reclamation of land adjacent to the river Murray.[5]

In Victoria there is no restriction on the value of the particular estates —the only limitation being that imposed by the grant of a limited appropriation for the purpose indicated.[6]

In Tasmania the minimum value of the estate is £12,000.[7]

In New South Wales the minimum is £20,000, but it is necessary to obtain the approval of both Houses of Parliament before the power can be exercised.[8] In all the States where powers of acquisition exist under Closer Settlement Acts, the powers have been extended by additional Acts to the settlement of returned soldiers and sailors on the land.

In relation to the Commonwealth Government, two powers of compulsory acquisition only have been granted. Under the Defence Act, 1903–17, the Governor-General may give general or particular authority to resume lands for any naval or military purposes.

By the Lighthouses Act, 1915, the Commonwealth Government may acquire compulsorily any lighthouse or marine mark or property used in connection therewith from any State, if it has failed to acquire the same by agreement.

[1] *E.g.* Railways Act (Queensland), 1914. Railway Construction Act (Tasmania), 1919. Railway Land Acquisition Act (Vict.), 1915. Housing Act (N.S.W.), 1912, No. 7. State Forests Act (N.S.W.), 1909, No. 7. State Coal Mines Act (N.S.W.), 1912, No. 70.

[2] Closer Settlement Act (Queensland), 1906–17; (Tasmania), 1913; (Victoria), 1915; (N.S.W.), 1904, No. 37.

[3] Railways Acts (W.A.), 1906 and 1915.

[4] Closer Settlement Act (Queensland), s. 2.

[5] Crown Lands Act (S.A.), 1915.

[6] Closer Settlement Act (Victoria), 1915.

[7] Closer Settlement Act (Tasmania), 1913, s. 17

[8] Closer Settlement Act (N.S.W.), 1907, s. 4.

In regard to the postal service, a power of compulsory use of land for purposes incidental to the service has been granted without any power of acquisition.

Who is authorised to acquire.—Where the compulsory acquisition of land is authorised, the power is ordinarily exercised by the authority charged with the execution of the purpose for which the land is required. In undertakings of the central Government, the acquiring authority will be the Governor-General or Governor in Council (*e.g.* Commonwealth Lands Acquisition Act 1906, New South Wales Public Works Act, 1912) of the Minister in whose department the particular act of administration falls. In some cases, as in the acquisition of land for closer settlement, the advice of a Board possessing some independence is required (*e.g.*, N.S.W., Closer Settlement Act, 1904; South Australia, Crown Lands Act, 1915; Tasmania, Closer Settlement Act, 4 Geo. IV, No. 39). In Victoria, the acquisition of lands for closer settlement is by the Closer Settlement Board itself (Victoria, Closer Settlement Acts, 1915, 1918). Where land is to be acquired for carrying out any work, the constructing authority or the promoters of the undertaking will exercise the power of acquisition (Queensland, Public Works Land Resumption Act, 1906–16, s. 4; Victoria, Public Works Act, 1915).

Mode of Acquisition.—Broadly speaking, there are two modes of acquisition: by publishing a notification in the Government *Gazette*, or by serving a notice on the owners of the land required. In many instances, to the notification in the Government *Gazette* is added a similar notification in the local newspapers. Publication in the *Gazette* is sufficient to vest the title in fee simple in the Crown; and all estates and interests in the land are thereby converted into claims for compensation.

Under the Public Works Act (1912) of *N.S.W.* acquisition by notice to the parties interested is an alternative to the method outlined above, and is to be used where it seems possible to acquire the land required by agreement (ss. 42–47).

In *Queensland* notification in the *Gazette* is provided for in the Closer Settlement Act (1906–17), and in the Discharged Soldiers Settlement Act (1917). This latter Act grants perpetual lease selections for farming (s. 4).

Under the Public Works Land Resumption Act (1906–16), if the Crown is not the constructing authority, the latter shall lay before the Governor in Council a memorial of the land required, giving security for compensation to be paid, and a statutory declaration by the chief executive officer that all the provisions of this Act have been complied with, and that the constructing authority is of opinion that the said land is required. The Governor in Council then acquires the land by proclamation (s. 7).

It is provided by the Railways Act (1914) that the Commissioner shall serve a notice of resumption on all persons having any estate or interest in the land to be acquired. This notice serves to vest the title in the

Commissioner in fee simple (ss. 48–9). The Land Act (1910–18) deals only with grazing leases. Notice of resumption is to be published in the *Gazette*, and a copy served on the lessee. Resumption shall take effect:

(*a*) In cases of resumption for public purposes, one month or later after service of notice.

(*b*) In *other* cases in which compensation is *not* payable, six months after service or later.

(*c*) In cases where compensation is payable twelve months after the final determination of the amount of compensation (s. 150).

Tasmania follows the model of N.S.W. as regards notification in the *Gazette*, and has also the common provision that a copy of this notification is to be laid before Parliament. But by s. 18 of the Lands Resumation Act (1 Geo. V, No. 11) either House may within thirty days, by resolution, declare the notification void. This grant of parliamentary control is rather exceptional.

In *Victoria* notice is given to the parties interested, under the Public Works Act (1915), and if they refuse to convey or show title the promoters of the public undertaking, after depositing the purchase money and executing a deed-poll, become owners of the land (ss. 121–2). The Local Government Act (1915) combines both methods of acquisition, publication in the *Gazette* being followed within seven days by service of a notice on the owners, who may appear before the Municipal Council to support their objections. If the Council finds it necessary to take the lands compulsorily, the finding of the Council and all relevant documents are forwarded to the Minister, who may confirm or disallow the order. If he confirms the decision of the local authority, a notice to that effect is published in the *Gazette* (ss. 465–7).

Notification in the *Gazette* is the method employed under the Closer Settlement Act, but the first step is a resolution of both Houses, indicating the land to be acquired (s. 35).

In acquiring land for railways the Governor in Council may, if there is no township in the neighbourhood, declare in the *Gazette* that specified land, not exceeding 200 acres, should be acquired for township purposes (Railway Lands Acquisition Act, 1915, s. 36).

In *Western Australia* publication in the *Gazette* is the method employed (Public Works Act, 1902). But notice of resumption may be annulled within ninety days.

In *South Australia* the position is governed by the Crown Lands Act (1915). For resumption for general purposes three months' notice must be given (s. 56). In the case of Closer Settlement lands a full statement must be placed before Parliament within thirty days (s. 153). Notice to acquire large estates must be made in writing two years before the date of intended acquisition—and one year before in the case of irrigation land adjacent to the river Murray (s. 165). If, within six months, the price agreed upon has been paid or tendered, and the owner has refused to sign a conveyance or transfer to the Crown, it shall be lawful for the

Government, by proclamation in the *Gazette*, to declare the land compulsorily acquired (s. 170).

In the case of the Commonwealth the Governor-General, having directed that land shall be acquired compulsorily, a notification is inserted in the Government *Gazette*, declaring that the land has been acquired for some public purpose expressed, and a copy of the notification is laid before Parliament. The publication in the *Gazette* operates to vest the land in the Commonwealth, free of all incumbrances, and all rights are converted into claims for compensation. Notice must be served on the owners, or such of them as can be found. The effect of the notification in the *Gazette* may be nullified by a resolution of either House of Parliament " where the land is Crown land of a State which is dedicated for a public park, and for the recreation or amusement of the public," and in all cases except where (*a*) moneys have been appropriated by Parliament for the purpose for which the land was acquired ; (*b*) where the Government has sanctioned the proposed work, and money is legally available therefor ; or (*c*) where the Minister certifies that the estimated value of the land does not exceed £100. If the notification is so nullified, the owner has a claim for compensation for damage suffered. (Lands Acquisition Act, 1906, ss. 14–19.)

The Award of Compensation.—In the matter of the tribunals which assess compensation for lands acquired by compulsory process, various methods are met with in the several States. Although no one method can be laid down as common to all, each State has some such system as this : the person whose land has been compulsorily acquired, and the authority which has taken the land, each choose an arbitrator [1] ; the arbitrators, before they commence their sittings, appoint an umpire [2] to whom disputed points may be referred ; the arbitrators then set about the determination of how much compensation is to be awarded.[3]

Under Commonwealth Law,[4] in the absence of agreement, claims for compensation are determined in Federal or State Courts, and may not be referred to arbitration by such Courts without consent of parties.

The trial is by a judge without a jury.[5] Interest at the rate of 3 per cent. is payable on the amount of compensation, as from the date of acquisition.[6]

In New South Wales the owner can make a claim for compensation against the constructing authority and the Crown Solicitor, and, if

[1] In South Australia, if estates are " large " (*i.e.* of a value over £20,000), there is a third arbitrator, who is a judge of the Supreme Court (Crown Land Act, 1915, s. 172).

[2] In Tasmania the umpire—who is a judge of the Supreme Court—is a third arbitrator sitting with the other two (Closer Settlement Act, 4 Geo. V, c. 39, s. 36). Similarly Western Australia, if the disputed compensation is over £500 (2 Ed. VII, c. 47, ss. 48, 50).

[3] South Australia Crown Lands Act, 1915, s. 292. Victoria Public Works Act, 1915.

[4] Lands Acquisition Act, 1906.

[5] Ibid., s. 37.

[6] Ibid., s. 40.

compensation cannot be agreed upon,[1] the claimant can bring an action against the constructing authority[2] in the Supreme Court before judge and jury of four (or twelve if demanded).

In Queensland[3] compensation may be determined[4] by the Land Appeal Court[5] (consisting of the District Court Judge and two members of the Land Court). Under the Railways Act a claim can be made against the Commissioner of Railways, and if there is failure of agreement the compensation is to be determined by the Land Court[6] with an appeal to the Land Appeal Court.[7] Similar provisions appear in the Public Works Land Resumption Act, 1906–16, which Act is invoked by the Soldiers Settlement Act, 1917.

In Victoria, under the Public Works Act, a Court of Petty Sessions determines claims for compensation under £50. If they are larger[8] they may be determined by a jury (or if called for a special jury) presided over by the sheriff.

Under the Local Government Act, 1915, when the claim is under £500, it is to be determined by a police magistrate—whose decision is final—sitting as a Court of Petty Sessions; or, if the claim is over £500, by a County Court Judge from whom an appeal lies to a Judge of the Supreme Court[9]—without a jury—whose decision is final.[10]

Basis of Award.—Generally speaking, the basis on which the award of compensation is made for the land resumed is the same in all States, though, in the case of South Australia, there is not the same definiteness that we get in the legislation of the other States. The Public Works Act, 1902, of Western Australia, s. 63, provides that, in determining the amount of compensation, four matters only are to be taken into account:

1. The probable and reasonable price at which the land with improvements on it, or the estate or interest of the claimant might have been expected to sell at the date of resumption, without regard to the increased value occasioned by the proposed public work.

2. The damage sustained by the severance of the land from other adjoining land, or by such other land being injuriously affected.

3. The Court may award an amount which it deems proper, not exceeding 10 per cent. on the amount ascertained under the provisions of this section for compulsory taking.

[1] Within ninety days after making the claim.

[2] In Tasmania, against the Minister (Public Purposes Act, 1 Geo. V, s. 112).

[3] Under the Closer Settlement Act, 1906–17.

[4] Ibid., s. 19.

[5] Ibid., s. 17.

[6] The Land Court is a permanent body, consisting of three expert land valuers.

[7] Railways Act, 1914, s. 60.

[8] Say over £50.

[9] In Western Australia by 2 Ed. VII, c. 47, ss. 48 and 50, the police magistrate or Supreme Court Judge sits as President of the Compensation Court.

[10] Similar provisions appear in the Closer Settlement Act, 1915, where compensation is assessed only by the Supreme Court Judge. Also in the Railway Lands Acquisition Act, 1915.

4. To the compensation shall be added the rents and profits received form the land from the day of taking to the making of the award, allowing for the cost of collecting, or, at the Minister's option, interest on the amount of compensation at the rate of 6 per cent. per annum.

The first two of these provisions appear in all the other States with minor variations, such as the Victorian provision in the case of land for railways, that the compensation is to be limited to the value of the land on the day of the commencement of the session of Parliament during which the Act authorising the construction was passed. In Victoria and Queensland compensation is to be paid up to the value of the land, but the Acts do not provide how the value is to be reckoned. However, the Queensland Land Act, 1910–18, dealing with leaseholds for grazing, provides that the total amount payable for the value of the land to an incoming lessee for a term of years shall not exceed, exclusive of what is payable for improvements, a sum equal to 6*d*. for each sheep or 4*s*. per head of cattle on the carrying capacity of the holding multiplied by the number of years, up to ten, comprised in the remainder of the term. The Tasmanian Lands Resumption Act, 1900, 1 Geo. V, No. 11, enacts that the assessment of compensation shall be based on the valuation of the land on January 1 preceding the acquisition. Victoria and Tasmania provide for regard being had to enhancement or depreciation in value of the owner's land adjoining that resumed, owing to the carrying out of the work. This enhancement or depreciation is to be set off or added to the amount of compensation. Queensland has the same provision in the Railways Act, 1914, s. 256, and in the Public Works Land Resumption Act, 1906–16. Western Australia and South Australia make no provisions for this, and Western Australia appears to be the only State, providing specifically for 10 per cent. being added at the discretion of the Court for compulsory acquisition.

In Western Australia the compensation Court may award easements over the land acquired, and take their value into account in awarding compensation.

The position in N.S.W. follows the general plan. There are no provisions for enhancement or depreciation being taken into account. The value of the land at the time of notification in the *Gazette*, without reference to any alteration in value arising from the establishment of the public work or railway thereon, is the measure of compensation. Special provisions exist for compensation for damage caused by severance, or for damage to the surface caused by underground sewers or tunnels ; though in the latter case no compensation is to be paid unless the surface is damaged. Where land is resumed within five years of alienation, the compensation shall be the price paid by the grantee, together with a sum not exceeding 100 per cent. of that sum in addition to compensation for improvements.

THE PLEBISCITE, NATIONALITY AND THE STATE IN INTERNATIONAL AFFAIRS.

[*Contributed by* D. P. Heatley, Esq.]

For some years, even before the stupendous revelation that international law might be only an archaic law, a process of disintegration of thought had been going on, touching the principles that underlie the organisation and well-being of a State. Sovereignty was coming to be looked upon as a spent force. Too little heed was being taken that in both fact and right sovereignty, as Spinoza insisted, is a relationship, and that there is a true, as well as a false, absolute in political authority. We have to think both, and at once, of the capacities of the patient and of the powers of the agent or the wielder of authority. The State, we were, and are still being, told, is invited to retreat before an advancing trade union, or guild, or church. The residuum of right or power thereby left by the ascendant economic energy of the age to "the State," as a moderator and adjuster, becomes so petty, and is so precariously founded and so obviously retained on sufferance, that the road, though it may be perilous, is not long to the doctrine of Bakunin, that in the past the State was an evil, but was an historical necessity, and it must, just as necessarily, sooner or later disappear altogether.

Facts—the significance of which consists in the relationship of thing to thing—are the parents of theories, and the historian's most fruitful field lies in the inquiry into the relation of what is thought to what is done in the course of political development. If we have need to-day of a Grotius, we have at least equal need of a Bodin, rather than of a Hobbes; and the great works of both Bodin and Grotius were the children of wars—of civil wars for one, of international wars for the other. Bodin was the precursor, rather than the spiritual ancestor, of Grotius, not in time only, but also in thought, for it was necessary to define and secure the State before it was possible to define due relations of State to State in an international system.

Bodin's Definition of the State.—With high courage Bodin defined State or Commonwealth in the very first words of his elaborate treatise, *De Republica*, and in the eighth chapter of the first book—the key chapter of the whole work—we see his special pride in defining sovereignty, which, he says, no jurist and no philosopher had hitherto defined. *Respublica est familiarum rerumque inter ipsas communium summa potestate ac ratione moderata multitudo.* Except for one attribute, the definition is not more

helpful than that of Cicero, when he is explaining *respublica* as the interest of the people: *populus autem non omnis hominum coetus, quoquo modo congregatus, sed coetus multitudinis iuris consensu et communione utilitatis sociatus.* The association of supreme power and reason is the characteristic and troublesome feature in the first of these definitions, as the association of a community in right and advantage is the characteristic of the second. But Bodin's definition requires especially that there be sovereignty in the State. In the French version of his work he defines sovereignty (*souveraineté*) as *la puissance absolue & perpetuelle d'une Republique.* In the words of the better-known Latin version, sovereignty (*maiestas*) is *summa in cives ac subditos legibusque soluta potestas.* The attribute permanence, although it is omitted from the definition in Latin, is essential for Bodin. It is insisted upon in the exposition that follows in the same chapter. *Maiestas vero nec maiore potestate nec legibus ullis nec tempore definitur.* If absolute power be given for only a short or a fixed time to one or many, they are not thereby invested with sovereignty. They are merely men put in trust.

The Permanence of the State.—It is this attribute of permanence of constituted authority that came to lie at the root of the conception of the State. It was imperative to guard against the fluctuating and the transient in authority. The acceptance of this attribute led in normal reasoning to the minute, and almost morbid, solicitude of political thinkers for the " right institution " of a commonwealth. In the extreme it led to the advocacy of *raison d'État,* which Machiavelli had required rather than justified. Whether the sovereign should be the sovereign one or the sovereign many does not affect the necessity for the principle and the quality at stake. The value of a sovereign authority clearly and not precariously constituted: that is what was being sought and emphasised. Althusius, the ablest and most suggestive of Bodin's critics, a thinker who presents much of the wisdom of the Middle Age in politics, and almost the whole of the root idea of a school of thought far from silent in our own days, admitted that there is an authority in a State that is or should be permanent, although he would prefer to say that it is the kingdom or the people, rather than the king or the kingship, that is immortal. It is, however, to the authoritarians and absolutists, and not to the " monarcho-machic " school, that we look appropriately for insistence on the quality of permanence in sovereignty in a State: the king never dies; the kingship never dies; and the kingship is for the State. There were reasons, especially in the interaction of religion and politics, and in the painful choice for many between orthodoxy and loyalty, why the quality should be looked upon with suspicion, when it was given a constitutional, a formally constituted, embodiment; and the instruments devised and used for its enforcement were at times extraordinary and arbitrary, not conforming to a rule of law. The leading domestic problem for States of the main European state system in the sixteenth and seventeenth centuries impeded the general acceptance of

this quality of the State. An inalienable sovereignty, such as Althusius, long before Rousseau, required for the people and for the people only, might be an uncontrolled tyranny in the hands of one, with or without a council ; in the hands of the many it might be, as Burke was to point out, a multiplied tyranny. " Who are the State ? " is both a harder and usually a more pertinent question than " What is the State ? "

It is this quality of permanence of constituted authority, standing for rights and obligations, that gives political force to the impressiveness of Hooker and to the grandiloquence of Burke:

> As any man's deed past is good as long as himself continueth, so the act of a public society of men done five hundred years since standeth as theirs, who presently are of the same societies, because corporations are immortal: we were then alive in our predecessors, and they in their successors do live still.

Society, for Burke, who is of kin to Hooker, is " a partnership, not only between those who are living, but between those who are living, those who are dead, and those who are to be born." We are only life-renters of this England, not absolute possessors. We lose not only the significance and permanent wisdom of the politics of Burke, in their height and in their depth, but even the meaning of history as the life-presentation of peoples in their living bodies politic, if, presuming to be plainly practical, we say that all this is merely mysticism forced into politics. The first duty of the State, once it has being and fruitful activity, and authority, is to provide for its own conservation. That is an imperious command on every high conception of the State. It is the teaching of continuity. It may have issue in its excess. It may lead to the doctrine of prescriptive rights and to the call for the exercise of sympathetic, which may be arbitrary, powers for its enforcement. But, short of its excess, it is the teaching of a genuinely political conservatism of rights for the securities and advantages of civil society. It is a declaration that there is a civil interest to be cherished ; that there are constitutional instruments and rights and powers for cherishing that interest; but that all institutions are means, not ends. It is not the teaching of the conservatism of mere inertia of orthodoxy in forms and ritual and hierarchies.

The Sovereignty and Continuity of the State.—It was pre-eminently in international relations that this idea of permanence of life and authority imparted an essential quality to the State, and it was imparted in that century when, in England not least, the quality seemed to be threatened in the conflict of home politics concerning sovereignty and the balance of parts in the Constitution. In the vast negotiations and great congresses, and the definitive treaty-making of the seventeenth century, the conception came to stand out clearly that a State is more than a government or a sovereignty or a people of the day merely—that it is to be regarded as a body politic with a past, present and future ; that it is the inheritor and the actual bearer and transmitter

of rights and obligations. It has sovereignty; or within it there is a supreme power—power over its own subjects, although great may be the peril in the character and capacity of the power. Also, it has its rights and its obligations toward its equals—other States with like attributes. This quality of permanence was required, and had to be assumed, for stability and the fulfilment of contracts in international relations. Without it there could be no security either in the actual dealings of people with people, or in the reasoning of writers on public law.

What is the State?—In politics the terms that are essential and in every-day use are the very terms that are least clearly defined. "A people," "nationality," "sovereignty," "the State": a formula can easily be invented, and has too readily been invented, to cover each of these. But formula has to wrestle with realities. Political science has as its theme "The State"; and yet it is possible to point to expositions of political thought and of constitutions and of governmental procedure and power that would be clearer and more consistent and helpful if the writers did not use the term "State" at all. Certainly in the study of the politics of history, as distinguishable and even distinct from a vague, discretionary or arbitrary political philosophy, with an arrogated prerogative of the mind, we have to think of and come to know States before we begin to assign attributes to "The State." We must ask: Whose State? Who are the people you are thinking of? Of what quality, of what political aptitudes, are they? What is the nature of the Constitution in which the people in question find part of the expression of its life and character—part at least of its identity as a people? How comes and how is expressed that quality which is more and greater than the mere sum of the individual members of every group of men, and yet is essential to each of them as a true member—their common purpose and spirit, a general will, a will directed to a good that each member, in loyalty, should feel to be his own, and to which he must in his social self contribute? "England could not tolerate this from Spain in 1589": perhaps we can define our "England" there and then. "France in 1789 had to recover herself." "France?" Who or what is the France that is in the mind for 1789? What "self"?

These root questions are not viewed, and should not be viewed, from the same standpoint by politician, lawyer, historian and political thinker, although each can contribute to the approximation of success in deed to truth as tested by principle and ideal—an approximation which is the end of all politics. We see the difference in standpoint if we distinguish, as we should, between constitutionality and constitutionalism. Constitutionality is a quality that, as Selden might have said, and wished us to say of prerogative, can be told what it is: it is for the lawyers and judges and a court of reference to tell, with a risk of legalism and rigidity. But a people is a living body politic. Constitutionality was largely with the King and the Crown lawyers under Charles I of England; constitutionalism

was then very largely with the Parliamentarians. Constitutionalism is process, not result—not something or some quality that has developed to completeness and realised its end. It marks the spirit of the polity of a people, a spirit that has to work out its meaning and to acquire strength through the struggles of that people: and such is the view of the historian. It proceeds along several lines; there is not a uniformity of thought, or of action and endeavour; and thus arises the sphere of the politician and his justification. The justification has its limits, since party exists for the State—the whole. Public law knows nothing of party. A party as soon as it is placed in power, a party man become minister (a healthily expressive word) is an instrument of the State. Even an Opposition should be " His Majesty's Opposition "—an Opposition in the interest of His Majesty; and the majesty of the State, and the interest of the whole, are compelling and transcendent. There is, again, a constitutionalism which may be presented to the mind in deference to an ideal for " the " State in general, and to the claims of a system of political thought. Such is the sphere of vision of the political philosopher; and where, endowed with the historical sense, he has regard to the books of life of the several great political peoples, and thinks of actual processes pursued and going on, and does not precipitately draw up the table of the law, he may do much to ally the present and actual with the ideal, much to ally the severity of the historian with the aspirations of the idealist. Just as legislation is necessary to correct and supplement laws, so constitutionalism is necessary to correct and supplement, and by continuous and silent revolution change and adapt, the constitution by law established and accepted.

It is illogical, and in the practice of politics it may be disastrous, not to distinguish these habits of mind, and the function of each. But it is sound and useful to assign to each its sphere and function. Each by holding fast to its own can help the whole. The philosopher does not allow us to lose sight of the general will; the politician and the historian have to think of the will of all, and may have to question the reality both of the " will " and of the " all." The historian may have in due time to record that the doctrine of the general will has been equalled in effect, subversive as much as creative, by the formula, " the right of a people to self-determination "—a formula which, in its English style, more than in its French,[1] is majestic and captivating. The doctrine is old, because the problem is old. But the opportunity has lately seemed glaring for its obtrusive enunciation. In every part of its texture the formula calls for analysis and scrutiny: right, and how it is to be secured, and how translated into power, and maintained as rightful power; people—what it is or who they are; the self, if there is one, and the means present or available to the people, or to those who wish to stand forth as a people among the peoples, of expressing the will or of manifesting the claim of right to live a life that is their own; and the relation of that people and

[1] Le droit des peuples de disposer d'eux mêmes; le droit de libre disposition.

of that life to the sum of peoples, and to the whole, more than sum, that we term the community of peoples, or the Society of Peoples (or Nations) which accept international law, and do not disavow an international morality. Here is no place for the dogma that gives fervour to a sect. But here is much need of the penetration and circumspection whence comes security in thought and for action.

What is Nationality?—If we are asked who or what, in a scientific sense, are the " nations " of Europe and of the world to-day, we say that the question is absurd. But, if we are asked who are the " peoples " in fact, we point to those aggregates of population that live together, and for many generations may have lived together under common laws and institutions, and in the cultivation of interests and ideals in common, and have a constituted government ; all of which possessions and attributes make up what we term " State." Expressions like " the American nation," " Canada a nation," are loose and inaccurate expressions. We must go further and say that the factors of race and nationality in historical and political problems are, in general, uncertain factors. They cannot be ignored, but they are not calculable. Is the evidence of race, in political analysis to-day, to be anatomical—the form of the skull, and bodily traits like the colour of the hair and the eye, and are we to agree with those who conclude that there are corresponding differences in the direction of the thought and in the aptitudes of the representatives of the race ? Even if one people, or a branch of a race, excels or seems to excel in exact science and in practical affairs as well, while another people, a branch of the same race, excels in poetry and in works of the imagination, are we therefore to draw conclusions political in their character, and, in obedience to general principles and " laws of nature," provoke schemes of national reconstruction ? Or, is not the better view that we have moved far away from the time and regions of the primitive racial types, that they have become material for the palæontologist, and that what we now call races are large communities of peoples that have a kinship in civilisation more than by blood ? And yet we may all agree that, even as there is something of truth in the claim, " The soil is the nation," since the soil is a substantial part of the environment which helps to determine what man does, so there is something of truth in the view that race, as a primary and durable factor, helps to determine what man is—what men in their several large groups are. It is still refreshing to read in Bodin—and here, and not only here, Bodin was the father of Montesquieu—that " in old times, when nations were not so mingled as they have become, they did know a northern man by his flaxen hair and his green eyes." But, at least, let us not pass unheeded the author's note of caution ; and let us add to it a political reserve. Unless we do, we may, with not less reward, found our politics upon a Wordsworthian contemplation of Nature.

In all questions of politics we have to fix the mind as closely and definitely as possible on the facts that go to make up a " case," as the

lawyer says; a "situation," as the political historian says. In questions international in character that is pre-eminently the desideratum, and it is pre-eminently the difficulty owing to the variety of the regions from which we have to draw the material for our survey. It is necessary to eschew facile generalisation. One of the best safeguards against such fatal facility is found in impartially presenting to the mind the points of view, as of a Castlereagh and a Mackintosh, that are politically pertinent, and that have been historically disclosed, on any international question.

The Vienna Congress.—The discussions, for example, on the transfer of Genoa in 1815 against the wishes of the Genoese are fruitful in lessons for the historical and political inquirer; and Sir James Mackintosh's reasoning may be commended to many who hold themselves to be his political representatives to-day. He detested "the modern doctrine of rounding territory and following natural boundaries, and melting down small States into masses, and substituting lines of defence, and right and left flanks, instead of justice and the law of nations, and ancient possession and national feeling: the system of Louis XIV and Napoleon, of the spoilers of Poland, and the spoilers of Norway and Genoa."[1] According to Mackintosh, the security of all States was the essential principle underlying the balance of power, and was its justification. The statesmen of the Congress seemed to him to be guilty of the stupendous mistake of arrogating to themselves the power to make nations, and to make them of irreconcilable elements, just as the authors of the French Revolution were guilty of the gross error of thinking that human skill could make a government. We may not agree with the speaker's high tribute to what he called "the ancient principle"; but we can all, at least, support his plea, that nationality has often been preserved by the very variety of irregularities of frontier and inequalities of strength that are often dreaded, as well as by the diversity of character that is to be looked for and welcomed among different peoples, each contributing in the resources of material wealth and of mind to the sum of civilisation.

The Principle of Nationality.—The principle of nationality has been a considerable welding and conserving force in society. That is the central argument for it, as was emphasised by Mr. Balfour in a noteworthy address at Oxford about a year ago. "The basis of the principle of nationality was that people who had this consciousness of nationality could naturally and easily work together as one community." In so far as political order and continuity are thereby promoted, nationality furthers the true interest of a State. But too much must not be read into the rough and crude generalisation from the history of politics, that the State which is founded on nationality is the strongest and most durable. There is a nationalism that is exclusive, and that separates, as well as a nationalism that unites and incorporates. Like religion, it may be peace-bearer and militant; it may both unite and divide. In so far as

[1] *Hansard* (for April 27, 1815), vol. xxx, 919–20.

nationality does not detract from, and helps towards, the identity and durability of a State, and to the sense of the whole consciously felt throughout its members, including those who are not of pure descent, it is all for good. But nationality, at its best, is after all only a factor towards the building and the maintenance of a State—only one, although it is a main, contribution towards those living memories and feelings, the successes and the failures of men living together as a society, that have gone to the making of the State, for that society of men. It may assert itself out of proportion, both within the State and beyond its boundaries. There is a spurious, unrestrained nationalism, as there is a spurious, unrestrained internationalism. There is the nationalism of enthusiasm, partly fed by pride in the past, and there is the internationalism of emotionalism, largely fed by superabundance of faith in the future. A nationalism of this type can contribute little to a true international understanding, and may hinder much. The spurious internationalism despises and overrules even the true nationality that has helped in the building of stable States, which it is the function of International Law to protect. The true interest of a State, which is itself the meeting and harmonising of parts in relation to a whole, points to the recognition and acceptance of an abiding interest of a Society of States ; and this larger interest must look to and depend upon, even while it should give colour and tone to, the interest of the part. We may take, as a helpful analogy, an Assembly of Estates, and a representative Parliament. In the first, interests are regarded as separate, and are even antagonistic to each other, and, with no provision for arbitrament, a deadlock is the natural consequence. But where there is a representative Parliament the interests are mingled and combined. They are viewed together in relation to a whole : a general interest is recognised although it may not always prevail. It is the argument for an International High Court ; and we are not unmindful of a conciliar movement, which has been described as the last hope of mediæval Christendom.

Nationality and Democracy.—The advocates of the doctrine of nationality have usually spoken in the language of democracy. The change, said Cavour in April 1861, which had just been accomplished in Italy had been inspired by the principle of liberty (like, he said, the English Revolution of 1688) ; it had also been founded on the right of nationality, from which it derived additional force. It has seemed necessary to show that a people has been conscious of being a people, and can strive towards " self "-expression, and is prepared to submit to sacrifices for it. But we must not conclude that " the people," with a continuous declaration of the opinion of the majority, and of successive and changing majorities, is to direct and control the State thus founded. These are different problems —the assertion of a people as distinct from others, and it may be in opposition to one other in particular ; and the manner of rule which that people is ready to accept and according to its wisdom applies for its own internal well-being. We must not confuse, as if they were a political identity, Horatius keeping the bridge and Brutus driving out the tyrant ;

and a Stein may appeal to and use the people against the national oppressor, and be no democrat when that oppressor has himself been crushed. The nation is the whole body of citizens ; the " will " of this body is sovereign ; we accept the will of the numerical majority as the will of all, and we trust that the will of all may be the general will—the will for the general good. That is only one line of reasoning. There is another. The general interest may not be appreciated and expressed by the numerical majority, and yet it is the general interest, and not of to-day merely, for which the State stands, and for which it is endowed with instruments and officers. The problem of democracy is a problem of the historical endowment of a people, and of its political aptitude. Peoples who have to break with their past are forced to take refuge in rationalism, and in the over-mastering sway of principles. Political principles are historico-ethical, but not for all peoples, and not similarly for any two peoples. We seek in customary laws evidence of the life of a people, and the explanation of what has gone to the building up of a people out of a population. Customary democracies are as yet few, but they are the only true democracies. In an article written many years ago, on the publication of Mr. (now Lord) Bryce's *The American Commonwealth*—and one does not forget that a proposed blessing on " our nation " was transformed into a blessing on " these United States "—Mr. Woodrow Wilson remarked that the task still remained of explaining democracy " by " America with a view to supplementing the admirable explanation of democracy " in " America, and he remarked further that the English alone have approached popular institutions through habit. These are highly suggestive remarks, whether they are well and truly founded or not. Democracy cannot be the same for all peoples : as the people, so in large measure its constitution and government. We have to be tolerably sure of making democracy safe for the world before we press it, or its adaptation (for there is no one-and-only democracy), upon the world—the several peoples of the world—for acceptance. The doubts in regard to democracy are more instructive than the certainties, for it is only the ardent disciples who have worked out all the sums and heed not the sacrifice of the principle of liberty to mere quantity. But the doubts are still many and grave. The right, apart from the expediency, of the ascendancy of the numerical majority is not generally accepted, and, if right carries with it power, still there is no justification of tyranny merely through possession of the power to tyrannise. That the majority has a right (in Locke's phrase) to conclude the rest has come to be a working convention, but it is subject to grave qualification in principle, as well as to much and unavoidable violation in practice. How and when are we sure that we have the deliberate will or considered opinion of " the majority " ? Does democracy depend upon the vote and ascendancy of " the odd man " ? Is the appeal only from the odd man drunk to the odd man (we hope) sober ? What is the sphere of the boss and the caucus, and of a party press or a controlled press ? What (and it is an essential

question) is the proportion of active to passive opinion ? Does democracy require an economic community in sympathy with it, " empire," in the seventeenth-century phrase, following the balance of property, or, as the phrase now is, economic power preceding and controlling political power ? Or, is government an empire of laws, and not of men—not of present-day erring men merely ? Are these fundamentals that it is well to agree upon, and well to secure in a written and rigid constitution ; and why ? On the reasoning of democracy and of nationality, what right has one people, or the constituted sovereign of that people, or of more than one, to prescribe what shall be the constitution and the consequent manner of life for another people ?

The Plebiscite and "Self-determination."—Questions of this character take us to the very heart of public policy to-day. They are, for example, intimately involved in the application of the plebiscite. The plebiscite holds a not insignificant place for the student of the history of modern Europe, as well as in present-day international politics. It has received much attention from writers on the Continent of Europe, but very little in Britain. Lately it has been made the subject of two useful works by American writers.[1] Their publication should do good by inviting attention to the circumstances in which plebiscites have been used in questions of separation, cession and annexation. The lesson is the expected one, that circumstances alter cases ; and, as Sir John Macdonell said in the discussion on a paper[2] dealing with this subject read before the Grotius Society, whereas on the Continent of Europe the disposition is to start from general principles, in England the disposition is to start from a particular case ; and he doubted whether it is possible to formulate general rules. As in most questions, differences are more worthy of inquiry—they are more striking and more instructive—than resemblances. In answer to a question put by Lord Rosebery at the time of the proposed cession of Heligoland to Germany, Lord Salisbury, then Secretary of State for Foreign Affairs, said that he saw no necessity of taking a plebiscite of the inhabitants, and that the plebiscite was not " among the traditions " of Britain. A

[1] (*a*) *A Monograph on Plebiscites*, with a Collection of Official Documents, by Sarah Wambaugh. Prepared under the supervision of James Scott Brown, Director of the Division of International Law of the Carnegie Endowment for International Peace. New York : Oxford University Press, 1920, pp. xxxv. (including a bibliographical list of six pages) + 1088, of which pp. 1–169 give a well-presented study of the theory and practice of plebiscites in relation to national self-determination and changes of sovereignty, and pp. 173–1072 give a valuable collection of historical documents, extending from the period of the French Revolution to the separation of Norway from Sweden in 1905. There are useful footnotes.

(*b*) *The Employment of the Plebiscite in the Determination of Sovereignty* (Johns Hopkins University Studies), by Johannes Mattern, Assistant Librarian in the Johns Hopkins University, Baltimore : The Johns Hopkins Press, 1920, pp. ix + 214. The work is well planned, and the design is skilfully carried out. The three concluding chapters show much discrimination and insight.

[2] *Plebiscites and the League of Nations Covenant*, by Dr. Paul de Auer, Avocat, Budapest : *Transactions of the Grotius Society*, vol. vi, 1921.

plebiscite might be "an awkward precedent" for other parts of the Empire—that multi-cellular British "State" to which it has taxed the acumen of jurist and statesman to fix a label from the laboratory of politics.

The meaning of things historical and political is found in their origin and in their end. The origin of the plebiscite as a rough-and-ready political instrument was the imperfectly representative character of government as constituted in Continental States in the eighteenth century, and the growth of a body of political doctrine subversive of the very foundation of such States. Prescription, in part outworn, had to yield to reason, aspiring and unrestrained. Even in England the system of representative government was not representative. The end that was sought was government by consent. Rousseau inspired; and Rousseauism, in its dominant pre-requisites of civic education, and a high social purpose for men in small self-sustaining communities, could not be complied with. "Sovereignty belongs only to the people. . . . Every people has alone the right to give itself its laws, and the inalienable right of changing its laws." This historic declaration was of profound significance for both the internal and the external politics of revolutionary France. But the definitive in word is often the inconclusive in fact. When Bonaparte asked Cambacérès what a law is, and what could be settled by law, and how much the consuls could do in their Council of State by *règlements*, without calling in the Legislature, Cambacérès answered that a *règlement* is only the particular application of the law; the law is the general rule made by those who have the right and the power to make it. Bonaparte smiled; and he did not pursue the inquiry further.

It is necessary for representative government to combine capacity and consent, to add the merit of aristocracy to the hypothesis of democracy. The modern democracy for large communities must be mediate. It cannot be direct; and yet the direct vote of the whole body of citizens, or of the whole adult population, as well as the approval of a second House, may be an additional security; and one may support the Referendum while rejecting the Initiative. Much of the opposition to the adoption of the plebiscite has been due to the preference of a mediate and better-informed manifestation of opinion to an immediate and worse-informed, and much of it has been due to the way in which revolutionary or post-Revolution France applied the doctrine of the plebiscite at once to encourage secession from an old allegiance in favour of France, and to discourage, by threat of the death-penalty, the proposal to cede any part of the soil of France to a foreign Power.

The former of these grounds of objection to the plebiscite—that of the preference for a mediate democracy—is only in part tenable. In some of the best-known votes—for example, the Italian plebiscites of 1848, 1860, 1866 and 1870—the vote was practically that of the whole adult male population. In other cases, however, not only has the

vote been taken on a limited suffrage, but the vote has been a vote for delegates with instructions to an assembly convoked *ad hoc.*

In the early case of the union of Avignon and the Comtat Venaissin with the French Republic,[1] in 1791, we are brought to the very root of most of our doubts and inquiries. The discussions turned chiefly on the following questions: Is the vote free? Is it sufficiently expressed under legal and solemn forms? Is it to the interest of France to accept the union? Is it to the interest of both Avignon and France that there be a union? Will other States accept it?

If the doctrine of the plebiscite is open to question and grave limitation in the internal affairs of a State, it is even more liable to question in external and international affairs. It is now exceptional not to safeguard the fundamental, constitutional law of a State by placing it beyond the immediate range of majorities. That fact should of itself suggest the need for insisting on the most deliberate procedure before disturbing the being and stability of a State, in the light of its own sovereignty and in the eyes of other States, by inducing the loss of part of its population through secession or transference. The methods of the wire-puller and the caucus are far from being appropriate to the determining of these questions; and while a Charles Albert is collecting votes, a Radetzky may be collecting men. A vote, "popular," well-informed, is useful and in certain circumstances may be necessary as an expression of opinion and as a help towards a decision. But there are important factors, not of the moment only, to be brought into the reckoning, and, whereas in a question of internal politics the decision may be temporary, and may be revoked (for a minority has a right to work to become a majority), in a question of sovereignty over a number of people, part of a population forming the living representation of a State, the decision is meant to be final, is a matter of the loss of a member—a matter, it may be, of life and death—and is justified, if justified it be, only in the success of the settled fact. In general, the conclusion must be that a State, having regard to its own constituted authority, cannot concede to part of the population within its territorial sovereignty a right of secession based upon a right of self-determination. That is almost a truism. But it is sufficient. We have to protect the State against its own dissolution, and, as a minimum, and for a beginning, we fix the canon against self-slaughter. In seeking to pay deference to the principle of nationality, and in striving to represent the nation, we must not dissolve the State.

But the receiving of allegiance carries with it the duty of protection. Even the master of absolutists laid down that the obligation to obey continues only so long as the power to protect and to provide contentment through good laws; and, according to one whom Hobbes's contemporary statesman-critic held to be a better philosopher than the author of the *Leviathan, securitas securitate mutua pactscenda est.* Where the inconveniences of allegiance seem by well-proved experience vastly to out-

[1] Wambaugh, ibid., pp. 173–268.

weigh the advantages men will rebel: there remains the ultimate "appeal to Heaven," whether it be to the sword or to an International High Court of Justice. All may conclude, with the apologist of the Revolution not made but prevented, that to teach that there is this ultimate right to be acted upon by men in a State is far from laying a perpetual foundation for disorder, although great was the influence of the apologist for 1688 upon those who, almost a century later, dissolved "the political bands" that connected them (they did not thus express themselves) with their own people, and proceeded "to assume among the Powers of the earth the separate and equal station to which the Laws of Nature and of Nature's God" seemed to entitle them. Every Declaration of Independence should show a decent respect to the opinions of mankind, and of men, and not of one generation only. But the lessons of July the Fourth are lessons of the failure of members of one people, with faults on both sides, to preserve attachment to a larger loyalty, rather than lessons in the "right of a people to self-determination."

The Aalands Islands Question.—In the Report of the Committee of three jurists [1] to whom was referred the question of the Aaland Islands, with the majority vote of the islanders in favour of union with Sweden, there is a statement of the principle of self-determination and of the rights of peoples that may well be admitted to a source-book for the understanding of the international politics of to-day:

> Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations.
>
> On the contrary, in the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of the sovereignty of every State. Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation. Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method is, exclusively, an attribute of the sovereignty of every State which is definitively constituted. A dispute between two States concerning such a question, under normal conditions, therefore, bears upon a question which International Law leaves entirely to the domestic jurisdiction of one of the States concerned. Any other solution would amount to an infringement of sovereign rights of a State, and would involve the risk of creating difficulties and a lack of stability which would not only be contrary to the very idea embodied in the term "State," but would also endanger the interests of the international com-

[1] See *Official Journal* of the League of Nations, Special Supplement, No. 3, October 1920. For some criticism of the Report see Professor Vlught's *La Question des Îles d'Aland* (pp. 82), and *Réponse au Livre Bleu du Gouvernement de Suède* (pp. 29): Leyden, 1921.

munity. If this right is not possessed by a large or small section of a nation, neither can it be held by the State to which the national group wishes to be attached, nor by any other State.

That is a concise, clear and helpful statement. But it is followed, at a short interval, by a statement concise enough, but neither helpful nor clear :

If one part of a State actually separates itself from that State, the separation is necessarily limited in its effect to the population of the territory which has taken part in the act of separation. Though the political projects leading to the separation may be manifested in different ways in different parts of the territory, nevertheless these projects all have an equal value as a foundation for the new legal order, though of course only in so far as those who adopt them are able to maintain them. It may even be said that if a separation occurs from a political organism which is more or less autonomous and which is itself *de facto* in process of political transformation, this organism cannot at the very moment when it transforms itself outside the domain of positive law invoke the principles of this law in order to force upon a national group a political status which the latter refuses to accept.

In this statement (1) the opening words are questionable in expression and in political thought, since there is a confusion between population and State ; (2) an attempt is made to distinguish the various motives of parts of the population that agree in making a change of political status, but due allowance is not made for the fact that it is through that concerted action of the parts that the change is effected ; and (3) we are being invited to transport, for a time, the subject-status of at least part of the population to thin air or to dreamland or fairyland. The Finlanders claim to have been autonomous since 1809. Even, however, if Finland be termed a full State only from the Russian Revolution, we have to reason from the controlling facts that, after proclaiming her independence, she had her status as an independent sovereign State recognised by other States, including Sweden,[1] and that the population of the Aaland Archipelago is within that State, unless and until a change of sovereignty should be determined for it. A very large proportion—over 90 per cent.—of the Aaland Islanders declared in favour of a union with Sweden. But with this expression of a preference must be taken the fact, which is referred to in the Report of the Jurists, but with striking lack of perspective, that the Swedish element in the population of the Aaland Islands is only a small part of the total Swedish population in Finland. The Aaland Islanders number only 22,000 (obviously—as all admit—no fit

[1] M. Branting to the Secretary-General of the League of Nations, July 9, 1921 : " Le 4 janvier 1918, le Gouvernement Suédois a reconnu la Finlande comme un État indépendant et souverain, cette reconnaissance étant sans réserve, mais il est évident qu'un acte de ce genre implique seulement la reconnaissance d'un Gouvernement légal et constitué, mais nullement celle des frontières de ce même État. Des conflits peuvent toujours surgir au sujet des frontières entre des États voisins. . . ." The worth of this statement ceases at the words " sans réserve." But there is significance in the words that follow.

body for an independent State), whereas there are 320,000 Swedes in the Abo Archipelago and on the mainland, subjects of Finland, and forming about 11 per cent. of the total population of Finland.

The question, accordingly, of the Aaland Islands seemed to resolve itself into a question of the protection due within and by the State to an exceptional element in the population from which the State, as an economic and political whole, claimed allegiance; in other words, a question of guarantee of settled rule and of satisfying legitimate aspirations towards comfortable, commodious living. In the words of the Commission of Rapporteurs appointed by the League of Nations: "The separation of a minority from a State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees." The Finnish State has shown readiness to provide guarantees of this quality touching language—"the very soul of the people"—and civil and political rights and powers. The decision of the Council of the League in June last should have influences for good. It should put a check to lax interpretations of what constitutes a "people," and to a tendency, begotten of domestic politics, and a disease of the times, to undermine the quality of the State, while it utters a warning against rule that is arbitrary and oppressive.

THE NATIONALITY OF COMPANIES.

[*Contributed by* LIEUT.-COLONEL F. NORRIS.]

THE grounds on which the nationality of a company ought to be decided form admittedly one of the most important legal problems which have been brought into prominence by the war, and M. Pépy's work[1] appears to be a serious contribution to the study of the question. Briefly, the problem to be solved seems to be the following: Is the nationality of a company to be determined by that of the majority of its shareholders and directors, or by that of the locality of its place of incorporation or registered office?

So far as French legislation is concerned, neither the Code of Commerce, the laws of 1857, 1867 or 1893, the Decrees of January 22, 1868, nor that of July 10, 1901, referring to Insurance Companies, deals directly with this question. Even the law of November 22, 1913, which enables changes to be made in the articles of a company at a general meeting of the shareholders, while prohibiting any change in its nationality, is silent as to how this nationality is to be determined. This question has, however, been constantly before the French Tribunals since the middle of the nineteenth century. A problem, for instance, that has often arisen is that of whether Articles 13, 14 and 16 of the Civil Code, which deal with the rights of foreigners to sue and be sued in the French Courts, are applicable to companies.

A decision of the Civil Tribunal of Lille of May 21, 1908, seems to summarise the attitude of the French Courts to this question prior to the war.

> Attendu que les sociétés de même que les individus ont une nationalité . . . ; que la plupart des auteurs et la jurisprudence . . . se sont mis d'accord pour admettre que la nationalité d'une société s'établit par son siège social, pourvu qu'il soit serieux et non fictif, parce que l'on ne peut avoir, malgré les difficultés d'appréciation, qu'un domicile tandisque le lieu de l'acte constitutif de la société ferait dépendre la nationalité de la volonté des parties, ce qui donnerait trop de facilités a la fraude ; que la nationalité des fondateurs ou des actionnaires est sujette à des variations constantes, et ne peut être un criterium à propos d'une société qui constitue un être indépendant doué d'une personalité propre, et souvent d'une société de capitaux a *l'intuitus personal*, ne joue aucun rôle ; que la lieu d'exploitation peut se répartir entre plusieurs pays et par suite ne pas être unique.

[1] *La Nationalité des Sociétés.* Andre Pépy, Librairie de la Société du Recueil Sirey.

However, when, on the outbreak of war in 1914, all the belligerents enacted special measures, dealing with the persons of enemy subjects, and their property, the question arose almost immediately as to whether a company with a majority of enemy shareholders and directors should be deemed to enjoy the benefits of French nationality, solely because its registered office happened to be situated in French territory. Why, indeed, did it follow that the accomplishment of the formalities necessary for establishing the registered office of a company should bring into existence, not only a legal being, but one endowed with all the advantages of nationality ?

A French decree of September 27, 1914, prohibited commercial relations between Frenchmen and the subjects of Germany and Austria, and a further decree of November 7, 1915, extended the prohibition to dealings with Bulgarians, while a law of April 4, 1915, had already imposed penalties for the infringement of the former decree.

The application of these decrees soon forced the French Courts to modify their former decisions that French nationality was conferred on a company, whose registered office was in France, independent of the nationality of the majority of its shareholders and directors, and the real object of its activities. A start was made in this direction by the sequestration of the shares and interests belonging to alien enemies, although the companies themselves, as separate entities, were still regarded as being of French nationality. This solution of the difficulty did not, however, by any means satisfy either public opinion, or indeed appear to be based in the circumstances on any equitable grounds, and the Tribunals soon began boldly to overrule their former decisions, and to decide the question of the nationality of a company according to its origin. sources of capital, personnel and the real aim and object of its activities. Indeed, a distinct tendency towards this change appears as far back as October, 1914, in a judgment of the Civil Tribunal of Le Havre.

Attendu que nous estimons qu'il est dans l'interêt de la défense nationale de saisir—arrêter toutes les marchandises de quelque nature qu'elles soient, appartenant a la maison N. et *Cie* qui jusqu'à preuve du contraire, parait avoir été constituée uniquement avec des capitaux allemands, qu'il est de notoriété publique que cette maison est administrée exclusivement par des capitalistes de cette nationalité. . . .

There were, naturally, however, many cases before the Courts which were difficult to decide, owing to the intimate and far-reaching effects of German financial operations, as, for instance, that of the Aron Electricity Meter, Ltd., of London and Navarre (Civil Tribunals of the Seine, May 8, 1917 ; *Revue de droit international privé*, 1917, p. 316). In this case the Meter Company Aron of Levallois-Perrett had been sequestrated, and the Aron Electricity Meter Company applied for the order of sequestration to be rescinded on the ground that they were in reality the owners of the company's capital. It was, however, shown

that at the last general meeting of the French company a majority of the shares were in German hands, that the Managing Director who exercised a preponderating influence in the conduct of the company's affairs was a German, and that in fact the different British and French companies which had been constituted to exploit the Aron Meters were, according to a German Prospectus, affiliated to the Elektrizitätzähler-fabrik of Berlin-Charlottenburg, although it must be stated that the company's property in Berlin had been sequestrated as being that of an enemy company. The French Tribunal affirmed the sequestration order while acknowledging "que les rapports entre la société allemande, anglaise, française, sont incertains."

In many cases the French Tribunals appear at first, however, as in the case of the Conserves de Lenzbourg (*Revue de droit international privé*, 1916, p. 248), to have deliberately avoided directly overruling former decisions as to what conferred French nationality on a company, and to have enforced the Decree of September 27, 1914, sequestrating the property of companies with a preponderating enemy influence, while admitting, as the Lyons Tribunal did in this case, "qu'il parait difficile de lui contester de titre de Société française."

The guiding principles in these cases seem indeed to be well summed up by M. l'avocat général Godefroy in the Freitag (*Cour de Paris*, February 27, 1917, Clunet, 1917, p. 1457) and "Société des mines de Carberry" cases (*Journal des Soc.*, 1917, p. 94), cases in the following phrases:

> Actuellement et depuis le décret du 27th Septembre, 1914, la jurisprudence d'avant-guerre ne saurait plus être invoquée utilement, et il faut admettre des principes tous différents . . . ce ne sont plus les principes du Droit Privé mais ceux du Droit Public qui doivent triompher en la matière et nous guider.

These principles are also expressed in almost the same language in a circular of the Garde des Sceaux, which was intended to assure the application of the law of 1916 respecting the declaration of property owned by enemy subjects in France, and are reproduced in a circular of December 11, 1918, concerning the sequestration of enemy property in Alsace and Lorraine. These two circulars state that, as far as declarations and sequestrations are concerned, "les personnes morales" must be assimilated to individuals; but,

> il ne saurait être fait état, a l'egard des sociétés, de leur nationalité d'apparence. Les formes juridiques dont la société est revêtue, le lieu de son principal établissement, la nationalité des associés, gerants ou membres du conseil du surveillance, tous les indices auxquels s'attache le Droit Privé pour determiner la nationalité d'une société sont inopérants alors qu'il s'agit de fixer au point d'une du Droit Public, le caractère réel de cette société.

Coming to the present time, it would appear that, in the view of French jurisprudence, the decisions given during the war as to the grounds on

which the nationality of a company should be decided ought still to be maintained. In fact, it would appear that France is to-day searching for a formula which will completely prevent the establishment within its frontiers of a company whose activities, in spite of its apparent French nationality, are in reality opposed to the political and commercial interests of the country. It is even maintained by some that the right of foreigners to float a company in France, or even to become a shareholder in an existing company, is in question. The general trend of suggested legislative measures is to view the activities of foreigners in this connection with grave suspicion.

There are some interesting comparisons in M. Pépy's book between French legislation and that of other countries, and reference is naturally made to the decision of the House of Lords in the *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co.* (Great Britain) *Ltd.*, reported in 1916 2 A.C. 307, in which it was held by a majority, reversing the majority decision of the Court of Appeal, that in spite of the incorporation of the respondent company in England, the circumstances were such as to require investigation in reference to the control and management of the company. Lord Halsbury held that the company was in substance a hostile partnership, and that any payment to it would be illegal, as trading with the enemy. The similarity of this decision with that given by the French Tribunals seems to require no further demonstration.

The evolution of Egyptian jurisprudence in the same sense is also touched on, and also shows a resolution to abandon the old theory of looking solely to the registered office of a company to determine its nationality, instead of taking into consideration the nationality and civil domicile of the shareholders, and especially that of the directors and management, who, if they constitute a foreign element, should determine the national status of the company.

In conclusion, it is interesting to note that a pamphlet has just been published by M. Carlo Piola Caselli, entitled *La Nazionalità delle Società Commerciali e il Registro dei Commercanti*, which deals with the same question as M. Pépy's work, and contains references to the latter.

COMPARATIVE ADMINISTRATIVE LAW.

[*Contributed by* R. FEETHAM, ESQ., K.C.]

THE full title of the volume of Tagore lectures, delivered in 1918 at Calcutta by Mr. Ghose, who is a vakil of the High Court, is *Comparative Administrative Law, with special reference to the organisation and legal position of the administrative authorities in British India.*[1] The lecturer deals with Administrative Law in the sense in which that term is used in Professor Goodnow's work, which was published with a similar title in 1897. The present work, however, takes in some respects a wider range than Professor Goodnow's, which was limited to a study of the administrative systems of England, the United States, France and Germany. Mr. Ghose includes other European countries in his general survey, while making India his central theme. He also enters at some length into a consideration of the theoretical and constitutional implications underlying administrative law; his work thus claims attention, not only as a legal textbook by an eminent Indian lawyer, but also as a political treatise parts of which have a bearing, more or less direct, on the new Government of India Act, and the scheme of constitutional reform which it embodies.

It is right to pay a tribute, not only to Mr. Ghose's learning and industry, but also to the wisdom and sanity of the political comments which are to be found in his pages.

"The aim of a sound system of administrative law," he says, "should not be to cripple the powers of the State, but to provide effective guarantees that these will be wisely exercised. . . . A sound body of administrative law must therefore be a compromise between the claims of extreme autocracy on the one hand, and extreme legalism on the other."

He lays down that "Administration implies the performance of a trust" and proceeds:

Administrative law, rightly viewed, is the body of rules and principles by which Governments seek to discharge this trust with efficiency, and yet without avoidable injury to individual rights and interests. A sound body of administrative law can grow only on a double foundation of the recognition by the State of the worth of each individual citizen for his own sake, and of a corresponding recognition by the citizens as a whole of the indispensability in their own interest of a living, working, and efficiently organised Government, animated by a single desire to fulfil its trust.

In examining how this trust has been fulfilled by the Government of

[1] Calcutta. Butterworth & Co (India), Ltd., 1919.

India in the past, Mr. Ghose recognises the two important limitations on the autocracy of that Government which have arisen (1) from the fact that in its corporate character it has been liable to suit, by any private individual; and (2) from the fact that, though charged with plenary powers, it has laid down very strict rules regulating its own activities, and thus, as it were, by a series of self-denying ordinances, restricted its liberty of action. Mr. Ghose comments on the extent to which Indian legislatures, both central and provincial, had, up to the date at which his lectures were written, remained under official control, but points out that this fact must not be allowed to obscure their importance and the effect they have had on the tone and temper of the administration:

> There is, it is true, hardly any law which the Government may not get passed in any of the Legislative Councils in India, or which it may not prohibit or veto if it so wills. But, for all that, it cannot and will not act without the sanction of a rule of law formally passed and promulgated. The Executive, in other words, has to, and does habitually act in the open, and according to set rules, and not arbitrarily and in secrecy. The laws passed by Legislatures so constituted may not always be unexceptionable as laws, but they are none the less laws which, being laws, must place some limitations on the arbitrary exercise of powers.

In this latter connection reference is made to such enactments as the State Prisoners Regulations and the Internment Ordinances under the Defence of India Act, and the Rowlatt Bill, which was passing through the Indian Legislature at the time when the book was in the press. As to this, Mr. Ghose comments:

> The number of statutes which have thus proceeded to make the Executive, in certain matters, "a law unto themselves," far-reaching as some of them are in their operation, is, I believe, not yet very numerous.

Though regretting the provisions of such exceptional laws as are referred to above, Mr. Ghose sums up thus:

> Not only, therefore, is there in India the "rule of law," but it is of the same kind as that obtaining in England. It is this that has given stability to an alien Government. Those who aver that Orientals have no appreciation for any but personal rule, and that the one solution of the growing difficulties of administration in India is to erect Collectors of districts into petty despots, unchecked even by the administrative control of the higher Executive and unhampered by law, misread both history and human nature. The stability of British rule in India is best explained by the contrast it presents to the Oriental rule which preceded it. It was personal, it was arbitrary. It was, as the early English administrators justly complained, "not based on written rules and plain principles."

This recognition of the essential merit of British administration in India by an Indian lawyer may fitly be set side by side with the following statement contained in the final paragraph of the report of the Joint Select Committee of the two Houses of Parliament on the Government of India Bill, 1919:

The Government of India has accomplished great things for India's good, and one of its greatest services has been the introduction into India of a reign of law to which the Government itself is as much subject as the people it governs.

Mr. Ghose deals with two points of special interest in relation to the reforms scheme, to which reference may be made.

(1) The limit which past conditions have necessarily imposed on provincial autonomy ; and

(2) The method of controlling the distribution of powers between the Central Government and the provinces.

As to provincial autonomy, Mr. Ghose touches the root of the matter when he recognises " the necessary relation between measures of administrative decentralisation and the establishment of local representative institutions."

" The conclusion," he says, " to which an impartial study of administration, English and foreign, seems to point is that a close supervision on the part of a central administration is inseparable from the delegation of large discretionary powers to individual agents. Governments of continental Europe (starting from conditions closely similar to those obtaining in India) were in fact unable to effect administrative decentralisation until after they had learned to associate the representatives of the people in the localities with agents of the Government in the work of administration."

This is, in fact, a recognition of the position as stated by Mr. Montagu in expounding the scheme of Indian reforms, that the two alternatives between which a choice has ultimately to be made in the government of India are—government by despatch under the control of the British Parliament, and government by vote of the Indian electorate. One of the main objects of the Government of India Act, 1919, as recognised in its preamble, is to give to the provinces " in provincial matters the largest measure of independence of the government of India which is compatible with the due discharge by the latter of its own responsibilities " ; the new Act has, for the first time, rendered possible the attainment of this ideal of provincial autonomy by the creation of a new source of authority in the new provincial legislatures, and the extended electorates to which the provincial governments must henceforth look for guidance and support.

As to the distribution of powers between the central and provincial governments, and the central and provincial legislatures, Mr. Ghose in his ninth lecture refers to the essential features of federal unions, among which he notes, in common with other writers, " that there must be a common tribunal empowered to interpret the prescriptions of the federal constitution, to judge of the respective spheres of the Union and State Governments, and to hold in restraint the tendencies of each to encroach upon the domain assigned by the Constitution to the other." [1] In India,

[1] *Cf.* Professor Dicey's Introduction to eighth edition of *Law of the Constitution.*

as he says, the distribution of powers between central and provincial authorities was, prior to the Act of 1919, entirely a matter of executive arrangement, and was not provided by law.

Rules made under the new Act have for the first time classified the various powers of Government as central or provincial, according as they are to be exercised in future by the central Government or by provincial governments; but this classification remains a matter of domestic arrangement, as between the Governments concerned, and cannot be made the subject of legal decision in the Courts. The distribution of powers is still in effect left to executive authority, which has to interpret and apply the rules laid down; but the executive authority, which is ultimately responsible for seeing that the frontiers, as marked out by the rules, are not overstepped, is an executive authority which exercises its control from the outside, namely, the Secretary of State for India.[1]

Under the new system of government, this distribution of powers between central and provincial authorities has become a matter of far greater importance than in the past, because it no longer affects merely the conventions of official Governments, but the powers of elected legislatures, and the ministers responsible to such legislatures. It is a notable fact that in the quasi-federal system, now in operation in British India, an external executive authority is to take the place of the legal tribunal, which in ordinary federations is regarded as essential for the purpose of enforcing the division between central and provincial powers.

[1] Rule 4 made under Government of India Act, 1919, s. 1, provides that, in case of doubt, the Governor-General in Council is to decide whether a particular matter does or does not relate to a provincial subject; but s. 33 of the "principal Act"—the Government of India Act—requires the Governor-General in Council "to pay due obedience to all such orders as he may receive from the Secretary of State."

ROMAN-DUTCH *v.* ENGLISH LAW OF SALE.

[*Contributed by* Sir Mackenzie D. Chalmers, K.C.B.]

Mr. Mackeurtan, K.C., of the South African Bar, has written an admirable monograph on the Roman-Dutch law of sale, or, as he calls it, the "Sale of Goods in South Africa." Apart from its intrinsive merits, his book presents several aspects of interest to the English lawyer. It is of interest to see how the old Roman law of the *Digest* and the *Institutes* can adapt its rules to the changing requirements of modern life and commerce. But the way in which Mr. MacKeurtan has done his work gives a more practical interest to his book. Where rules of Roman-Dutch and English law are in accord he freely cites English reported cases, and freely and frankly criticises them when occasion arises. Throughout the book he is not content with merely recording rules and decisions, but he raises and investigates doubtful points and gives his opinion thereon. As he puts it in his preface, "Where these opinions are right, it is time they were recorded; where they are wrong, I anticipate speedy correction." When an English lawyer runs up against a difficulty in dealing with the law of sale he would often find it helpful to see how the point is dealt with in the Roman-Dutch law. Roman law is the foundation of Scottish law, and an inexhaustible store of legal principles:

> "The Roman law," says Tindal, C.J., in a well-known judgment, "forms no rule binding in itself on the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it prove to be supported by that law—the fruit of the researches of the most learned men, the collective wisdom of ages, and the ground-work of the municipal law of most of the countries of Europe" (*Acton* v. *Blundell* (1843), 12 M. & W. at p. 244).

As the English Sale of Goods Act merely enunciates and epitomises the principles of the Common Law, reference to Roman law to elucidate doubtful points is no less useful than it was when Tindal, C.J., delivered his judgment.

From the point of view of comparative jurisprudence, the Roman-Dutch law is of curious interest. On a given state of facts, a South African Court and an English Court would probably arrive at the same conclusion in forty-nine cases out of fifty. But in many of those cases the conclusion would be arrived at by a different route. Some salient examples may be given to illustrate this position.

For practical purposes a sale in South Africa is on the same footing as a sale in England or elsewhere. The seller parts with the goods, and gets the price, the buyer pays the price and gets the goods. But the underlying theory of the transaction is different. In England, sale is the transfer of the property in the thing sold from seller to buyer for a price. In Roman and Dutch law, adhering to the rule of Roman law, sale is "a mutual contract for the transfer of the *possession* of a thing in exchange for a price," plus a guarantee against eviction. Mr. Mackeurtan criticises this theory as being contrary to modern ideas, and inconvenient, and shows that it owes its origin to historical and not to utilitarian reasons (pp. 2, 170–2).

In England, when there is a contract of sale, and nothing is expressed as to the amount of the price or mode of fixing it, the buyer must pay a reasonable price. This doctrine of implied or reasonable price seems to be an original development of English law. In Roman or Roman-Dutch law the price or the mode of fixing it must be specified. Suppose a man goes into a shop and selects an article without asking the price. In that case Mr. MacKeurtan suggests a qualification of the rule which goes very near our rule of reasonable price. "It is submitted," he says, "that where the seller has a usual price—as in the case of a tradesman—there is a sale at that price," for the price is ascertainable.

Apart from any statutory enactment, there is a curious anti-profiteering rule in South Africa, founded on the Roman doctrine of *læsio enormis*:

> Where a seller has sold movable property of appreciable value for less than half its true value at the date of sale, or a purchaser has similarly bought for more than double such true value, the party damnified is entitled to a rescission of the contract or a correction of the price at the option of the other. The remedy exists quite independently of fraud, and the reasons for its existence may be summed up in the necessity for the frustration of human cupidity" (p. 17).

Such a rule in England would spread consternation among horse-dealers, and many other respectable tradesmen.

In South Africa, as in England, capacity to buy or sell is determined by the general law concerning capacity to contract. But the law relating to personal status differs in many details from English law. For the most part the Roman-Dutch rules as to minors seem to work out pretty much as do the English rules, though the reasons given for them differ, but three points of divergence may be noted. First:

> A male minor becomes a major by marriage, and remains a major, though the marriage be dissolved before he attains twenty-one. A female ceases to be a minor proper, and comes under the quasi-guardianship of her husband (p. 79).

Secondly, the Roman-Dutch, like most of the continental laws, recognises

the infant trader openly carrying on business on his own account. Thirdly, a minor, who expressly or impliedly represents himself to be of full age, is bound by his contract. The rules as to married women are complicated, but there is nothing corresponding to the English rule which confines the liability of a married woman to her separate estate free from restraint on anticipation. In addition to lunatics, Roman-Dutch law recognises the prodigal. The spendthrift may be judicially declared a *prodigus*, and interdicted from alienation or purchase without the leave of his curator (p. 98). The rule seems a sound one. There are many persons who, though sane for most purposes, are financial lunatics.

South Africa, for the comfort of its inhabitants, and the discomfort of its lawyers, has nothing corresponding to the Statute of Frauds:

> There are no formalities prescribed by law in South Africa for the sale of corporeal movables in general, though the disposal of certain special commodities (*e.g.* firearms, poisons, etc.) is regulated by statutes to which the reader is referred (p. 128).

In England the celebrated seventeenth section of the Statute of Frauds (29 Car. II, c. 3) is reproduced by s. 4 of the Sale of Goods Act, 1893, with a proviso that it shall not extend to Scotland. That country apparently has never had any similar enactment, and has never felt the want of it. Contracts for the sale of goods of the value of £10 and upwards are regulated by the same laws of evidence as contracts in general. In England the construction of the short seventeenth section has given rise to more litigation than any other branch of the subject. Mr. Benjamin, in his work on sale (ed. 5) devotes 160 pages to discussing the reported cases. Decisions are still accumulating, but perhaps some day we shall free ourselves from this incubus. It may be noted also that South Africa draws no distinction between contracts under seal and contracts not under seal. Contracts under seal have no sacrosanct character, and a body corporate can contract in the same way as a natural person.

In Roman-Dutch law a contract of sale must be completed by delivery. There is nothing corresponding to the English rule that, in the case of unascertained or future goods, the contract may be implemented by the appropriation of goods to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller. But the divergence between Roman-Dutch and English law is more apparent than real. If the English cases be carefully examined, they can all be explained as instances of constructive delivery, or, as it is called in Roman law, *traditio brevi manu*. When English judges invented the doctrine of appropriation of goods to the contract to pass the property, the recognition of constructive delivery had either not developed or had been overlooked. If delivery, actual or constructive, were substituted for appropriation to the contract in s. 18 of the Sale of Goods Act, the old Scottish rule would be restored; and the English rule would be made more intelligible.

As regards defects in the thing sold, Roman-Dutch and English law practically reach the same conclusions. The Roman law rule is *respondeat venditor.* The ancient English rule was *caveat emptor*; but, as Lord Campbell said in 1851, "the exceptions have well-nigh eaten up the rule," and ss. 13 to 15 of the Sale of Goods Act are in substantial accord with the Roman-Dutch law, though in the latter the rule is rather more broadly stated.

> The true rule is, not that the seller is only bound to warrant against latent defects, and not against patent ones, but that he is bound to warrant against all defects. But where the purchaser makes an inspection at or before the purchase which did disclose or ought to have disclosed a defect, he cannot afterwards complain, not because the seller, as a general rule of law, does not warrant against patent defects, but because by his conduct the purchaser is deemed to have waived his right, and to have bought the article subject to the disability, which, but for his laches, he would have discovered, or which he did discover, but considered of no consequence (p. 188).

The English rule of market overt is an anomalous survival, and there is nothing that resembles it in Roman-Dutch law. As the custom of market overt prevails in the City of London, if a man buys a stolen watch in Fleet Street, he gets a good title to it, liable only to be defeated if the thief is caught and prosecuted to conviction. But if he buys the stolen watch in the Strand, a few yards outside the City boundary, he gets no title to the watch, and can give none to anyone else. Scotland and South Africa do not indulge in these illogical exceptions to the general rule *nemo dat quod non habet.*

The question whether the right of stoppage *in transitu* exists in South Africa seems to have been much debated. Mr. MacKeurtan examines the question at length, and contends that it does not (pp. 248–53). But there are cases where the unpaid seller can recover his goods, although he has delivered them to a carrier for transmission to the insolvent buyer. After dealing with sales for cash, Mr. MacKeurtan goes on to say:

> If the sale is on credit, the vendor may, where delivery to the carrier is not delivery to the buyer, withhold delivery where the purchaser is insolvent in the English or South African sense, and where delivery to the carrier is delivery to buyer, he may stop in transit or recover from the buyer, or parties in possession, if the buyer becomes insolvent in the South African sense immediately after.

It seems, then, that in some cases the South African seller has a right of revendication, which exceeds the English right of stoppage *in transitu.*

Most of the theoretical, and some of the practical differences between English and South African law owe their origin to the Roman doctrine that sale is not a transfer of the property in goods, but merely a transfer of possession with a super-added guarantee against eviction.

But a gift in South Africa, like a gift in England, transfers the property in the thing given to the donee. This divergence between sale and gift gives rise to some rather curious and interesting developments, which Mr. MacKeurtan sums up in the following terms :

> First, where a sale at an inadequate price, or at an adequate price which is not intended to be exacted, is concluded between persons between whom gifts are prohibited by law. In such circumstances the Courts will, upon the transaction being challenged, inquire into the adequacy and exaction of the price, and, if satisfied that it is colourable, will declare it to be a gift. Secondly, when a sale is made for an inadequate price. In such case the transaction may, for that reason, be invalid as a sale, but valid as a gift; as where, for instance, the price is so low as to bear no appreciable relation to the value of the article, but the seller has fixed it on the ground of his affection for the purchaser. Where the price is not so low as to warrant the conclusion that the whole transaction is a gift, the transaction may be regarded as the sale of the article, with a gift of the amount by which the price is inadequate, and the paramount intention being that of sale, the contract will be treated accordingly.

This comes out very near the English rule that the Courts will not inquire into the adequacy of any *bona fide* consideration.

Probably enough has been said in this short notice of a very suggestive book to show that England and South Africa might each, with advantage, borrow certain principles from the law of the other country.

CARGOES IN THE PRIZE COURTS OF GREAT BRITAIN, FRANCE, ITALY AND GERMANY[1]

[*Contributed by* C. J. Colombos, Esq., LL.D.]

Contraband of War and the Doctrine of Continuous Voyage.—There is no subject of international law that has aroused, during the last century, so much discussion and controversy as the question of what is, and what is not, contraband. The Second Hague Peace Conference, 1907, succeeded, after much effort, in reaching an agreement as to the articles which should always be deemed absolutely contraband, and this classification was reproduced unaltered in the Declaration of London, 1909, and further completed by a free list and a list of goods conditionally contraband. Experience has, however, shown that these artificial classifications could not stand the test of war, and that much time and ingenuity had been vainly expended in attempting to define what was not capable of exact definition. The progress of science in utilising things on the free list for the production of munitions, the advance of State authority and the development of all kinds of comprehensive transport, have all tended to modify the accepted rules of international law in its relation to contraband. The distinction—more specious than real—between absolute and conditional contraband practically disappeared in the Great War by the adoption of the practice of considering goods of conditional contraband either to be subject to State control in the enemy country, or else bound for a port of naval or military equipment or a base of supply, all enemy ports being of this character.

Sir Samuel Evans held in the *Thai* [2] that it did not matter whether the goods were absolute or conditional contraband. If they were conditional contraband they were going to Hamburg, which was an enemy base ; and in the *San Jose* [3] he decreed condemnation of

[1] With reference to ships, *vide Journ. Comp. Leg.*, vol. ii. (October, 1920), p. 289.
[2] March 9, 1917. Transcript from the official shorthand notes.
[3] October 16, 1916. *Ibid.*

the cargo on the ground that it was destined for a *place* in Germany, which was either Hamburg or was, like Hamburg, used as a base of supply.

Such a big centre of international commerce as the port of London was considered by the German Prize Courts, in the *Medea*, a base of naval and military equipment.[1]

The Italian Prize Court has, likewise, decided that, in the present circumstances of the war, the doctrine of continuous voyage must, indiscriminately, be applied to conditional as well as to absolute contraband.[2]

Neutral destination has also been assimilated by the French Prize Court in the *Angelike* and the *Athènes*[3] to hostile destination, when the enemy Power has organised, on the coasts of the neutral country, bases of supply for its naval forces.

One of the direct results, on the other hand, of the measures taken by the belligerent States for ensuring the general control and distribution of nearly all the commodities existing or imported into their territory, has been to render these goods confiscable on the assumption that they were destined for the enemy State or its administrations (French Prize Courts in the *Sibilla*; the *Harrovian*).[4] This argument bears a striking resemblance to that advanced, as far back as 1793, in the British Memorandum to Neutrals: "The enemy Government has taken control of the corn supplies, and thus the trade is no longer to be regarded as a private mercantile speculation, but as the immediate operation of the very persons who have declared war."[5]

According to the Privy Council's decision in the case of the *Hakan*, even if the goods were meant for civilians, the general scarcity of food in Germany had made the victualling of the civil population a war problem.[6]

The German Prize Court invoked the same consideration in the *Niobe* for confiscating a cargo of food-stuffs bound for Bordeaux on the presumption that, in the presence of the great scarcity of food prevalent, no less in France than elsewhere, the French Government would have taken possession of the goods immediately on their arrival at Bordeaux, and would

[1] (1916); Grotius, *Annuaire International*, 1916, pp. 153, 161.
[2] The *Kyzicos* (1916), *Gazetta Ufficiale*, May 24, 1916, No. 122.
[3] (1918) *Journal Officiel*, May 21 and 22, 1918, pp. 4464 and 4491.
[4] (1916); (1921) *ibid.* March 18, 1916, p. 2132; May 5, 1921, p. 5498.
[5] Mr. Hammond's letter to Mr. Pinkney, 2 *State Papers*, 391.
[6] (1917) 34 T.L.R., p. 11.

then have used them, at its discretion, for the army or the civil population.[1]

The two elements, constituting the notion of contraband, viz. objects susceptible of a belligerent use and an enemy destination, have both received, during the Great War, an abnormal development and extension. The guiding principle followed, in fact, by the Courts, has been to condemn all goods capable of affording any help in the prosecution of hostilities—however remote that help might be—when conveyed, not only by direct transportation, but even by one or several and subsequent transits through neutral countries, to the enemy's territory. Proof of knowledge, or intention on the part of the shipper, was not deemed necessary. The general criterion was the real ultimate destination.

As Sir Henry Duke held in the *Pacific*,[2] transactions which have for their inevitable end the supply of contraband to a belligerent cannot be protected merely because the mind of the consignor was an innocent one. The question that has to be answered is: "Where would these goods have gone?"

The German Prize Court has, equally, decided in the *Norden* that hostile destination was of an objective character, and totally independent of the intention of the claimants or interested parties.[3] Even if the goods are sent to the enemy country by the exercise of the charterer's arbitrary powers, and against the express will of the shipper and the consignee, they will not escape condemnation (the *Kiew*).[4]

A novel point arose in the last war on the question whether the doctrine of continuous voyage should be extended to apply to raw materials imported into a neutral country, for the purpose of being treated or manufactured there, and subsequently exported to the enemy territory. In one of the first cases before the British Prize Court Sir Samuel Evans held that "it was immaterial whether afterwards the refined article would have been sent to Germany, if it was at the time of seizure on its way to Denmark to a purchaser who intended to put it through a manufacturing process.[5] In the *Balto*, however, he decided that leather sent to a neutral country for the object of being

[1] Hamburg Prize Court (1917), *Grotius, Annuaire International*, 1917, p. 302.

[2] Nov. 3, 1920. Transcript from the official shorthand notes. *Cf.* Lord Sterndale in the *Noordam* (1918), 120 *Law Times Reports*, p. 249.

[3] Hamburg Prize Court (1917), *Grotius, Annuaire International*, 1917, p. 272.

[4] *Ibid.* (1918) *Deutsche Juristen Zeitung*, 1918, p. 640.

[5] The *Kim* (cargo of lard to Shaub & Co.), (1915) 32 T.L.R., p. 22.

turned into boots for the enemy forces was confiscable.[1] But the inverse case of goods despatched to the enemy territory to be manufactured there for consumption in a neutral State was held not to apply: "If contraband is at once traced and captured on its way to the enemy territory, a Court of Prize will not embark upon inquiries as to what will ultimately become of it. Captors would be unduly puzzled or hampered in their action if they had to consider what the future history of a dealing with the goods might be" (Sir Samuel Evans in the *Axel Johnson*).[2]

Enemy Character.—It is often a matter of difficulty for Prize Courts to determine to whom goods seized as maritime prize actually belong, since there is no distinct and generally accepted fundamental principle as to the test to be applied. There is, in fact, an opposition between the British and American criterion of domicile, and the French and Italian criterion of nationality. At the London Naval Conference, 1909, the question of enemy character was discussed, but, owing to the lack of unanimous opinion, no fixed rule could be arrived at. Art. 58 simply laid down that the enemy character of the goods must depend on the enemy character of the owner, but it did not specify on what the enemy character of the owner was to depend. The question at issue has not been determined by the Declaration of London, nor by any other International Convention. Under the circumstances we may, therefore, expect a diversity of practice between the French and Italian prize decisions which strictly adhere to nationality (the *Martha-Bockhahn*; the *Moravia*),[3] and the British decisions which consider the domicile of the owner as the determining factor:

"It appears reasonably certain that the question, whether a particular individual ought to be regarded as an enemy or otherwise depends, *prima facie*, on his domicile, and domicile is, according to international law, a matter of inference from residence" (the Privy Council in the *Anglo-Mexican*).[4]

Property—how determined.—In countries where the civil code is more strongly the basis of municipal law than it is in Great Britain the evidence derived from the ship's papers outweighs all other considerations.

[1] (1917) 33 T.L.R., p. 244.

[2] (1917) *Br. and Col. Prize Cases*, vol. ii, p. 532.

[3] (1919) *Journal Officiel*, March 2, 1919, p. 2348; (1916) *Gazetta Ufficiale*, April 26, 1916, No. 98.

[4] (1917) 34 T.L.R., p. 149; *Cf.* Sir S. Evans in the *Hypatia* (1916), *Br. and Col. Prize Cases*, vol. ii, p. 377.

In the *Eir*, the French Prize Court decided that the production of the whole series of the bills of lading was sufficient to prove that claimants had conserved the right of disposal, and were the owners of the goods.[1]

The Italian Prize Court likewise held in the *Kyzicos* and the *Ambra*,[2] that proof of ownership can be made only by the bills of lading, as it is by their possession that the hypothesis of any transfers during the voyage can be excluded, and it is not the simple copies, but the originals of the bills of lading, which must be exhibited before the Court.

The same test was applied by the German Prize Court in disallowing a claim of neutral ownership, when only two out of the three bills of lading[3] had been produced.

At one time it was considered to be the established rule in France that the evidence of property must come exclusively from the documents found on board. This was the principle embodied in the *Règlement* of July 26, 1778. During the last war, however, the Appellate Tribunal (the *Conseil d'État*), has decreed, by a liberal interpretation of the old practice, that claimants will be receivable in invoking, besides the ship's papers, any other documents capable of substantiating their eventual rights of ownership (the *Czar Nicolai II*; the *Joannina*; the *Boeroe*).[4] The inference to be attached to documentary evidence is so strong in France that the *Conseil d'État* has, in the cases of the *Gorontalo* and the *Iberia*, reversed the decision of the Court below upon production by claimants of further documents, which they had not presented before, and which, added to the evidence filed in the first instance, were judged sufficient to establish their ownership on the goods.[5]

The British system distinguishes between transactions originating in time of peace and *post bellum* contracts. In the first case, the main determining factor is whether, according to the intention of the parties, the general property in the goods has passed to the purchaser or has remained in the vendor. The Sale of Goods Act, 1893,[6] lays down special rules as to how this intention should be

[1] (1915) *Journal Officiel*, June 1, 1915, p. 3517.

[2] (1916) *Gazetta Ufficiale*, May 24 and June 13, 1916, Nos. 122 and 138. *Cf.* the *Chrysopolis* (1916), *ibid.*, Jan. 4, 1917, No. 3.

[3] Hamburg Prize Court in the *Blommersdijk* (1917), *Grotius, Annuaire International*, 1917, p. 245.

[4] (1916); (1917) *Journal Officiel*, May 24 and Dec. 22, 1916, pp. 4622 and 1000; Dec. 24, 1917, p. 10555.

[5] (1917); (1921) *ibid.*, May 10, 1917, p. 3714; June 14, 1921, p. 6802.

[6] 56 & 57 Vict. c. 71 and 20.

discovered. The incidence of risk or loss is not a determining consideration.

The Privy Council has held in the *Parchim* that "it is well settled that the enemy character of goods seized as prize is to be determined by property, and not by risk"; and in the *Prinz Adalbert* that "the question whether the property has passed depends upon intention, and is a question of fact." [1]

Very different principles apply, however, to transactions entered into after the outbreak of hostilities or in contemplation of war. In such cases, the rules of municipal law, as to the passing of the property, or the intention of the parties, do not affect the belligerent captor's right of confiscating goods *in transitu*, on their way to the enemy, even though the strict legal ownership may be vested in the neutral consignor. As Sir Samuel Evans has held in the *Louisiana*,[2] "if the capture of cargoes shipped during war were made to depend upon such questions as relate to the passing of property under the Sale of Goods Act, it would dwindle to vanishing point, because nothing would be easier than for neutral vendors so to frame the contract that the legal property in goods contracted to be sold to, and intended to become ultimately the property of, the enemy, should remain in the vendors until actual delivery."

Side by side with this rule, there exists another in the converse case of transfers of ownership on merchandise afloat from an enemy to a neutral. It is the accepted practice that such transfers will not be recognised by a Court of Prize, as property which has a hostile character at the commencement of the voyage cannot change that character by assignment to a neutral. According to the Privy Council's decision in the *Vesta*, it is necessary, in order that property may pass, that the neutral consignee should have taken material possession of the goods, "a mere symbolical delivery by the handing over of mercantile documents" being insufficient.[3]

Material Date for determining Property.—The French invariable rule is that the legal status of a cargo must be appreciated at time of seizure, and that all posterior incidents are unable to influence, in any way, either the rights of the belligerent captor or of the seized goods (the *Fortuna*; the *Kirkoswald*).[4]

The same practice has been adopted by the German Prize Court

[1] (1917) 34 T.L.R., p. 53; (1917) 33 T.L.R., p. 490.
[2] (1916) 32 T.L.R., p. 619.
[3] (1921) 37 T.L.R., p. 505.
[4] (1917); (1918) *Journal Officiel*, April 27, 1917, p. 3362, and Aug. 21, 1918, p. 7389.

in the *Blommersdijk*, where it was held that ownership must be determined at date of capture.[1]

The decision of Sir Samuel Evans in the case of the *Rijn* was, likewise, that the material time for appreciating whether a cargo is contraband or not is the date of the seizure.[2]

What order should, however, be made by a Prize Court when goods which were the property of a neutral when seized had become the property of the enemy at the date of the neutral's claim ? The case arose for the first time in the *Palm Branch*, and Sir Samuel Evans condemned the cargo on the ground that if it were released to the neutral claimants, the latter would have held the goods, or their proceeds, as the trustees to, and for the benefit of, the German owners.[3] This decision was approved of by the Privy Council (except as to a small percentage of the cargo which did not belong to enemy underwriters).[4] It is open, nevertheless, to criticism as it imposes an unnecessary hardship on neutrals who cannot avail themselves of any reciprocity in instances where goods of enemy character at time of seizure become neutral at time of claim, as was the case in the *Gothland*.[5] This neutral character did not save them from condemnation, Sir Samuel Evans's argument being that they were enemy at date of capture, and, as decided subsequently by the same President in the *Frogner*,[6] " a captor is entitled to have his case tried according to the facts as they existed at the time of seizure, and he cannot be called upon to inquire—and the Court itself will not inquire—as to what happened afterwards."

The logical principle appears to be, in all cases where a change from neutral to enemy property takes place between the dates of seizure and claim, that the Court should order a fresh seizure to be effected (as was done by the French Prize Court in the *Ariadne*, and by Sir Samuel Evans in the *Schlesien*),[7] when the goods, being enemy at the time of the second seizure, can be validly condemned. If a fresh seizure should be deemed inappropriate, and as the goods cannot be released for the benefit of the enemy owner, the proper

[1] Hamburg Prize Court (1917), *Grotius, Annuaire International*, 1917, p. 245.

[2] (1917) *Br. and Col. Prize Cases*, vol. ii, p. 507, and the Privy Council in the *Odessa* (1915), 32 T.L.R., p. 103.

[3] (1916) 32 T.L.R., p. 725.

[4] (1918) 35 T.L.R., p. 163.

[5] (1916) *Br. and Col. Prize Cases*, vol. ii, p. 293.

[6] July 24, 1917. Transcript from the official shorthand notes.

[7] (1916) *Journal Official*, Aug. 7, 1916, p. 7152 ; (1916) *Br. and Col. Prize Cases*, ii, p. 268. *Cf.* Privy Council in the *Orteric* (1920), 123 *Law Times Reports*, p. 448.

order should be an order of detention into Court until the termination of the war.

Presumptions of Enemy Character. (1) *Goods on Enemy Ships.*— The immemorial rule of the sea was to confiscate all cargoes found on enemy vessels. The modern practice has been rightly defined by Art. 59 of the Declaration of London, 1909, which provides that, in the absence of proof of the neutral character of goods on board an enemy ship, they are to be presumed enemy. This doctrine was applied by the French Prize Court in the cases of the Ottoman vessels the *Sahda*, the *Farjella* [1] and the German ship the *Bülow*.[2] In the latter it was decided that such cargo is confiscable, even if it does not consist of contraband goods.

The Italian Prize Court has also held, in the case of the Austrian steamer the *Moravia*, that goods shipped on an enemy vessel must be presumed to belong to an enemy, and not to a neutral subject, when the neutral claimant is unable to furnish proof of his ownership.[3]

And Sir Samuel Evans's considered judgment in the *Arzilla* was that the doctrine which presumes goods found upon an enemy ship to be enemy, unless a distinctly neutral character by documentary proof accompanies them, must be applied to the case of a shipment before war, as well as to goods shipped after the outbreak of hostilities.[4]

The fact that a transfer of cargo from an enemy to a neutral vessel has been effected, and that the goods have been seized on the neutral ship, does not exempt such cargo from confiscation. The goods are, in fact, considered as being still in transit, and as retaining the enemy character, until the final destination is reached. In the case of a cargo originally shipped on the German steamer the *Neuenfels*, and subsequently transferred on the *Jeanne* and three other Scandinavian steamers, Sir Samuel Evans held that the neutral vessels were really in the position of vehicles employed by the enemy agent, and incorporated into the enemy service, just as much as if the German ship had got nearer to port, and had used the neutral vessels as lighters in waters which were possibly not deep enough for the German steamer to go through.[5]

[1] (1916) *Journal Officiel*, Sept. 10 and Oct. 29, 1916, pp. 8072 and 9450.
[2] (1920) *ibid.*, Aug. 1, 1920, p. 11022.
[3] (1916) *Gazetta Ufficiale*, April 26, 1916, No. 98.
[4] May 15, 1916. Transcript from the official shorthand notes.
[5] (1916) *Br. and Col. Prize Cases*, vol. ii, p. 227. *Cf.* the *Rijn* (1917), *ibid.*, vol. ii, p. 507, and the *Bawean* (1917), *ibid.*, vol. iii, p. 116.

There is equally no interruption in the continuity of transport when the cargo is seized on land after having been discharged from the enemy ship. This subject was discussed by the French Prize Court in the matter of various cargoes landed from the German steamers the *Anatolia*, the *Bogados*, the *Seriphos* and the *Tinos*, and seized in several warehouses of the port of Piræus. The Court ruled that goods sent by sea acquire and preserve the character of maritime cargo, and remain subject to the exercise of the belligerent's right of capture, even when seizure is effected on land, as distinguished from on board a ship.[1]

(2) *Consignments "to Order" or to Unreal Consignees.*—The reason of enemy presumption, in cases of shipments "to order," is that the consignor can change their destination according to his convenience or interest, and that a bill of lading "to order" can be endorsed and transferred from hand to hand, thus leaving open the question whether the original consignee will be the same person who will receive the goods at the conclusion of the voyage.

In the case of the cargo on the *N. Canellopoulos*, the French Prize Court decided that in all instances where goods are consigned "to order" they are presumed, unless proof to the contrary is given, to have an enemy destination.[2]

To shipments "to order" must be assimilated all consignments made out to the shipper's order. Sir Samuel Evans held in the *Kim*,[3] that the fact that the goods were consigned to the shipper's order was a circumstance of suspicion in considering the question whether the goods had a hostile ultimate destination. The same interpretation was adopted by the Italian Prize Court in the *Ismine*,[4] and the German Prize Court in the *Lupus*. There was, however,[5] an unwarrantable extension of this doctrine by the German Prize Court in the *Blommersdijk*, where all consignments to the Netherlands Oversea Trust were assimilated to shipments "to order," on the unjustifiable ground that this Association was strongly under the influence of the British Government, and that the cargoes might

[1] (1918) *Journal Officiel*, Dec. 17, 1918, p. 10848; confirmed on appeal (1921), *ibid.*, June 14, 1921, p. 6803. *Cf.* Italian Prize Court in the *Ambra* (1917), *Gazetta Ufficiale*, May 3, 1917, No. 104; and Evans in the *Eden Hall* (1916), *Br. and Col. Prize Cases*, vol. ii, p. 84.

[2] (1917) *Journal Officiel*, March 24, 1917, p. 2358.

[3] (1915) 32 T.L.R., p. 10.

[4] (1917) *Gazetta Ufficiale*, May, 12, 1917, No. 112.

[5] Berlin Supreme Court (1917), *Grotius, Annuaire International*, 1917, p. 260.

be diverted to the United Kingdom in spite of any protest made by Holland.[1]

On the other hand, a consignment to a named person does not exclude the presumption of enemy character when the consignee is only an apparent or dummy consignee acting as intermediary or conduit pipe for the real enemy buyers. Thus, the French Prize Court in the *Mar Mediterraneo* and the *Cadorna*[2] condemned goods nominally sent to named purchasers in Switzerland, but who, as evidence showed, were acting for the account of hidden German consignees. As Sir Samuel Evans laid down in the *Sydland*, "the named consignee must be a real and genuine consignee in the business and commercial sense. The fact that a person who happens to be in existence is named, if he be merely a nominee without any interest, is not enough."[3] Their Lordships' opinion was also that the "named consignee must mean some person, other than the consignor, to whom the consignor parted with the real control of the goods" (the *Louisiana*; the *Urna*).[4]

(3) *Absence or Concealment of Documentary Evidence.*—One of the elementary principles of prize law is that claimants must make a frank and straightforward statement of their exact position in relation to the goods claimed. Sir Samuel Evans, in the *Kankakee*, disallowed a claim for the release of the cargo, and commented adversely on the behaviour of the claimants, who "had wilfully withheld material information from the Court, wilfully refused to produce material documents in their possession or control, with the view of attempting to impose upon the Court."[5] And the Privy Council held in the *Carolina*[6] that the non-production of evidence, which might, without difficulty, be submitted by the appellant, is a serious consideration and necessarily throws doubt on his case.

The Italian Prize Court condemned the goods on the *Evangelistria* or *Donatos*,[7] as they were travelling without a bill of lading, and the ship's papers did not indicate the consignee.

A similar confiscation was decreed by the French Prize Court in

[1] Hamburg Prize Court (1917), *ibid.*, p. 245.

[2] (1917) (1920) *Journal Officiel*, Aug. 23, 1917, p. 6740; Aug. 28, 1920, p. 12625.

[3] (1916) *Br. and Col. Prize Cases*, vol. ii, p. 510.

[4] (1918) 34 T.L.R., p. 222; (1920) 36 T.L.R., p. 652.

[5] Feb. 4, 1918. Transcript from the official shorthand notes.

[6] July 23, 1920, *ibid.* *Cf.* Sir Henry Duke in the *Hollandia*, *ibid.*, May 11, 1920.

[7] (1917) *Gazetta Ufficiale*, April 19, 1917, No. 92.

the *Ellispontos*.[1] The Court, however, will not condemn a cargo when the claimants are in the impossibility, owing to circumstances of *force majeure*, beyond their control, to produce the necessary evidence. The case presented itself in the *Anatoli*, where it was proved that all the documents relating to the goods had been destroyed by a fire which had broken out at the French Legation in Athens.[2]

(4) *Hostile Association of Consignors or Consignees*.—There is a reasonable inference of enemy destination when the shippers or consignees are closely associated with enemy agents, or with the enemy Government, and when their trade operations are intimately connected with, or dependent upon, commercial organisations established on hostile territory. In the *Peloponnesos* the French Prize Court condemned a consignment of moneys sent to a company at Cavalla, it being notorious that its president was an agent of the enemy State[3]; and in the *Thessalia* and the *Epaminondas*,[4] the goods, although bound for a neutral country, were confiscated, as it was shown that both the shippers and the consignees were in constant relations with the enemy Powers, and were supplying them regularly with contraband articles. In the *Kirkoswald*,[5] the cargo was consigned, under the auspices of the *Société Suisse de Surveillance*, to a company established in Switzerland, but in close proximity to the German frontier, and having its chief office at Hanover. The Court condemned the goods and rejected the plea of the *Société Suisse de Surveillance*, that merchandise addressed to it ought to be exempted from capture. The Court held that the right of seizure is an attribute of sovereignty and, in the absence of an express declaration, can never be presumed to have been waived by the belligerent captor. Nothing in the instruments creating this Association implied that the French Government had renounced, in its favour, the rights of seizing and confiscating goods destined for the enemy territory.

Sir Samuel Evans, equally, decided in the *Tysla* that a cargo must be condemned when it is sent nominally to people who are agents for the German Government.[6]

[1] (1916) *Journal Officiel*, Dec. 18, 1916, p. 10883.
[2] (1917) *ibid.*, Aug. 23, 1917, p. 6741.
[3] (1918) *ibid.*, Nov. 27, 1916, p. 10316.
[4] (1918) *ibid.*, Oct. 14 and Dec. 21, 1918, pp. 8944 and 10984.
[5] (1918) *ibid.*, Aug. 21, 1918, p. 7389. Affirmed on appeal, *ibid.*, Sept. 24, 1920 p. 14101.
[6] Aug. 23, 1916. Transcript from the official shorthand notes.

There is also a strong inference of enemy character when the consignors or consignees are on the Black List (French Prize Court in the *Almazora*,[1] and Sir Samuel Evans in the *Stanton*).[2]

(5) *Statistical Cases.*—The ease with which, in the circumstances of the modern development of all sorts of transport, goods imported into a neutral country can find their way to the enemy territory, induced the Allies to adopt a rationing policy by which such imports were limited by the average pre-war quantities. In cases where shipments to neutral countries adjacent to enemy States were found to exceed considerably the statistical limits, the onus was thrown upon the claimants to discharge the inference of hostile destination.

Lord Sterndale, in the *Urna*,[3] condemned a cargo of dried fruits sent to Denmark on the ground that the imports into this country in the year of seizure were nearly three times higher the annual average before the war, and that the claimants had not rebutted the presumption that the goods were going to the enemy. And the Privy Council, in the *Baron Stjernblad*, held that it was impossible, in the presence of a tenfold increase of the imports of cocoa-beans to Sweden, to avoid suspicion or to predicate, with regard to any particular shipment, that a considerable portion thereof was not destined to find its way to Germany.[4]

The same presumption was acted upon by the French Prize Court in confiscating a cargo of wine on the *Tiber* consigned to Denmark when, according to the statistical evidence, the importations of wine into this neutral country, in the year under review, were eight times higher than the normal pre-war quantity.[5] But, in the case of the *Iberia*, the Court decreed release of the goods to claimants, who proved that the cargo, although exceeding the statistical limits, was really intended for *bona fide* consumption in Sweden.[6]

Restrictions on Maritime Capture. (1) *Goods on Neutral Ships.*—The immunity of enemy goods on neutral vessels was first advocated by the Dutch, in the middle of the seventeenth century, on the principle that a ship must be considered as a floating part of

[1] (1919) *Journal Officiel*, April 20, 1919, p. 4177.
[2] June 13, 1917. Transcript from the official shorthand notes.
[3] April 14, 1919. Transcript from the official shorthand notes. Affirmed on appeal (1920), 36 T.L.R., p. 652.
[4] (1917) 34 T.L.R., p. 106. *Cf.* the *Norne* (1921) 37 T.L.R., p. 541.
[5] (1918) *Journal Officiel*, May 19, 1918, p. 4356.
[6] (1919) *ibid.*, Aug. 11, 1919, p. 8492.

the country to which she belongs, and that a neutral territory cannot be invaded by a belligerent. This doctrine was revived, a century later, by Frederick of Prussia in the Silesian controversy, but it had never been acknowledged as a generally recognised rule of international law until the Declaration of Paris, 1856, when it was embodied in Art. 2, which stipulates that the neutral flag covers enemy goods, with the exception of contraband.

The French Prize Court held in the *Thessalia* [1] that it is incumbent on captors to establish that the contraband goods seized on the neutral vessel had an enemy destination. That, as this proof had not been given, the goods must be released, even when the documents produced by the claimants are not sufficient to justify the innocent character of the cargo. This decision is in accordance with Lord Sterndale's judgment in the *Dirigo* [2] that it is not enough for condemning goods that they should be on the list of contraband articles. If the condition of enemy destination is not fulfilled, the goods on the neutral ship cannot be declared good prize. The same opinion was expressed by the Italian Prize Court in the *Kyzicos*.[3]

In the cases of the *Batavier II* and *Batavier VI*, Sir Samuel Evans, following on a decision of the Ceylon Prize Court,[4] held that the protection of the neutral flag does not extend to cover goods landed from on board a neutral vessel and seized on land in various warehouses within the port of London.[5] This conclusion is, however, quite unfounded both on principles of justice and of logic. It is only by a legal fiction that goods captured on land are deemed to be a maritime prize as forming still part of the cargo of the vessel from which they were discharged, and it is, therefore, reasonable that they should continue to enjoy the protection afforded by the neutral ship on which they are assumed to be.

(2) *Enemy Goods shipped before the Outbreak of Hostilities or in Ignorance of War.*—The Sixth Hague Convention, 1907, exempts from condemnation enemy cargoes found on board enemy vessels which left their last port of departure before the commencement of the war, and are encountered on the high seas, while still ignorant of the outbreak of hostilities, or which, having entered, in such

[1] (1918) *ibid.*, Oct. 14, 1918, p. 8944.

[2] (1919) 35 T.L.R., p. 533. *Cf.* Privy Council in the *Hakan* (1917), 34 T.L.R., p. 11.

[3] (1916) *Gazetta Ufficiale*, Feb. 9, 1916, No. 32.

[4] The *Dandolo*, the *Caboto* (1916), *Br. and Col. Prize Cases*, vol. ii, p. 339.

[5] (1917) *ibid.*, vol. ii, p. 432. And Sir Henry Duke in the *Roma*, Dec. 11, 1919. Transcript from the official shorthand notes.

ignorance, a port of the adversary Power, are unable to leave, owing to circumstances beyond their control. This rule was applied by the French Prize Court in the *Jiul* and the *Oranje Nassau* [1] to cargoes shipped before the war, and by Sir Samuel Evans, in the *Southfield* [2] to transactions which took place without any contemplation of the imminence of war. But, as the French Prize Court held in the cases of the Austrian steamer the *Marienbad* and the German steamer the *Bülow*,[3] the provisions of the Hague Convention are absolutely foreign to cargoes seized on enemy vessels, which took refuge in the roadsteads of third States with the express object of avoiding capture by the enemy belligerent cruisers.

The decision of the Belgian Prize Court in the *Minna* was, likewise, that the German ship had not been prevented, by any cause of *force majeure*, from leaving the port of Ostend, but had, intentionally, elected to remain there through fear of the British men-of-war stationed in the North Sea.[4]

The same interpretation was adopted by the Chinese Prize Court in the case of the German steamers the *Kaethe*, the *Triumph*, the *Helene* and the *Sexta*, which had been using the port of Swatow as a refuge for more than two years. The Court ruled that the Convention was applicable only to merchantships *bona fide* engaged in business, and that vessels which had ceased trading, and had availed themselves of a neutral port for the purpose of escaping capture, could not claim any protection under the said Convention.[5] Sir Samuel Evans's judgment in the *Belgia* proceeded on identical considerations.[6]

(3) *Enemy Goods sent by Post.*—The inviolability afforded by Art. 1 of the Eleventh Hague Convention, 1907, to postal correspondence was taken advantage of by the Germans for covering consignments, on a large scale, of contraband goods smuggled furtively, as mails, into Germany. The Hague Convention was never meant, as Herrn Kriege, the German Delegate at the Peace Conference, had himself admitted, to protect such goods, and both Great Britain and France carefully examined all mails and post

[1] (1915) *Journal Officiel*, June 8 and Aug. 19, 1915, pp. 3721 and 5819.

[2] (1915) 31 T.L.R., p. 577. *Cf.* Privy Council in the *Daksa* (1919), 33 T.L.R., p. 281.

[3] (1919); (1920) *Journal Officiel*, Aug. 12, 1919, p. 8526, and Aug. 1, 1920, p. 11022.

[4] (1919) *Revue de droit international et de législation comparée*, 1920, p. 138.

[5] *Judgments of the High Prize Court of the Republic of China* (1918), translated by F. T. Cheng, 1919, pp. 1, 6, 11 and 31.

[6] (1915) 31 T.L.R., p. 490. Affirmed on appeal (1916), 32 T.L.R., p. 435.

parcels, and confiscated any contraband articles found in them (Sir Samuel Evans in the *Tubantia*, the *Gelria*, the *Hollandia*,[1] and the French Prize Court in the *Venezuela*).[2]

(4) *Enemy Goods seized after Conclusion of the Armistice.*—An armistice implies the suspension of all military and naval operations, and, consequently, of all maritime seizures. During the last war, however, the belligerent parties have stipulated, by express agreement, that all enemy ships and cargoes met at sea should continue to be liable to capture, and that the blockade of the enemy coasts should remain unchanged (Art. 26 of the Armistice Convention with Germany of November 11, 1918). In the case of a cargo of foodstuffs on the *Rannveig*, Sir Henry Duke rejected the claimant's contention that the despatch of goods to a German base of supply raised, owing to the suspension of hostilities, no presumption of warlike use, and held that the terms agreed upon in Art. 26 precluded the assumption that the Allied Powers had conceded to Germany the privilege of free importation of goods into her territory.[3]

The same meaning has been applied to the provisions of Art. 26 by the French Prize Court in the *Pena Castillo*.[4]

Liens on Seized Cargoes.—Courts of Prize have always declined to recognise any mortgage, charges, liens or other rights set up to defeat the belligerent captors' claims on hostile property. It is, in fact, a well-accepted principle that capture as a prize of war, *jure belli*, overrides all previous liens, and that the seized goods are acquired free from equities.

The French Prize Court, in the *Athena*,[5] refused to admit the alleged right of ownership of a pledgee creditor, and held that its only mission was to judge the validity or otherwise of maritime prizes, being incompetent to adjudicate on the "special" property or interest which a privileged creditor might have in the seized goods. In the *Marienbad* it disallowed, equally, the claim of neutral underwriters who contended that, as a result of the abandonment by the assured of the insured cargo, they had become, according to an express clause in the Insurance policy, the sole owners of the goods.

[1] (1916) 32 T.L.R., p. 529.

[2] (1919) *Journal Officiel*, March 14, 1919, p. 2719.

[3] March 16, 1920. Transcript from the official shorthand notes.

[4] (1920) *Journal Officiel*, April 29, 1920, p. 6499.

[5] (1918) *ibid.*, Dec. 17, 1918, p. 10848. *Cf.* the *Eir* (1916), *ibid.*, Aug. 17, 1916, p. 7506.

The Court rejected this claim on the ground that no such rights could ever be recognised by a prize jurisdiction.[1]

It was also laid down by their Lordships' Board in the *Odessa*,[2] that a Court of Prize will ignore any special rights created by private contracts or dealings between individuals. Legal property was the sole criterion.

The decision of the German Prize Court in the *Fenix* was, likewise, that prizes constitute an original method of acquiring possession, and are equivalent to an *occupatio jure belli* which vests in the captor, in conformity with the admitted rules of international law, the ownership, free from every encumbrance, of the goods seized. The captor can, consequently, recognise no mortgage or lien which third parties allege to have on the captured cargoes.[3]

The finding of the Chinese Prize Court in the *Albenga* was, equally, that a lawful seizure by a belligerent is an acquisition original in character, and free from any right to the same thing that might exist in third parties. The question whether a captured cargo is burdened with a debt is a civil matter outside the jurisdiction of the Prize Court.[4]

In distinct opposition to the above principles, the Italian Prize Court held, in the *Moravia* and the *Ambra*,[5] that the normal functions which the banks accomplish in modern maritime commerce by financing sellers on the security of the bills of lading, confer on these banks the exclusive legal possession and the right of disposal of the goods represented by the bills of lading. This right of lien dominates and absorbs the concurrent rights of seller and buyer alike. The rather remarkable conclusion of the Italian Prize Court was that it is the nationality of the pledgee bank that must determine the enemy or neutral character of the goods seized, and that, therefore, enemy goods must be released when the bank which holds the bills of lading is of non-enemy nationality.

Captor's Right to Freight on Released Goods.—There is a diversity of practice between the English and French rules as regards the right to freight of the belligerent captor, when part only of the intended voyage has been covered. The old British principle is that a captor is not entitled to freight, unless the goods have been

[1] (1919) *ibid.*, Aug. 12, 1919, p. 8526.

[2] (1915) 32 T.L.R., p. 103. *Cf.* the *Kronprinsessan Margareta* (1917), *Br. and Col. Prize Cases*, vol. ii, p. 409.

[3] Berlin Supreme Court (1914), *Zeitschrift für Völkerrecht*, vol. ix (1916), p. 103.

[4] (1918). Translated by F. T. Cheng, 1919, p. 16.

[5] (1916) *Gazetta Ufficiale*, April 26 and June 13, 1916, Nos. 98 and 138.

brought to the actual port of destination in accordance with the intention of the contracting parties, even although the ship may have performed a very large part of her voyage. Sir Samuel Evans strictly adhered to this rule in the *Roland*,[1] and refused to allow any freight on the ground that the goods had not been carried to the place where the parties intended them to be delivered and disposed of.

The question arose in the French Prize Court in the case of the *Barmbek*,[2] on the claim of a British company asking that the freight paid to the French Minister of Marine at a *pro rata itineris* be restored, as the charter-party which governed the contract of affreightment referred to the English law, under which no freight is due, except if the goods are brought to the port of destination. The Court ruled that a captor is not bound by any contracts which might have taken place between the shipper and the charterer or shipowner. The practice and procedure of a Prize Court cannot be modified by the municipal legislation of other States, but must rigorously follow the jurisdiction and practice admitted in its own country. That, in the words of Sir Samuel Evans [3] " any other solution would necessitate a close investigation of all the terms, conditions and circumstances involved in the contractual obligations of the parties, and of their rights and liabilities under foreign municipal law, which this Court has always refused to undertake." The principle of the captor's right to a proportionate freight had never been departed from in French prize jurisdiction,[4] and the claim must, consequently, be disallowed.

[1] (1915) 31 T.L.R., p. 357.
[2] (1916) *Journal Officiel*, July 24, 1916, p. 6611.
[3] The *Roland* (1915), 31 T.L.R., p. 357.
[4] Cf. the *Julius*, Nov. 25, 1870 ; the *Vorsetzen*, Nov. 2, 1871 ; the *Alma*, Dec. 13, 1871.

EXTERRITORIALITY IN CHINA.

[*Contributed by* LAUNCELOT PACKER, ESQ.]

ALL well-wishers of China are confronted with a widespread belief which prevails among foreigners there, of two fundamental facts concerning its people:

First—That the basis of action in China is economic rather than moral, free scope being left to pursuit of immediate economic advantage, unhampered by moral consideration—in other words, that the Chinese people have not the code of morals which influences action in the West.

Second—That in China the family, is the unit, and not the individual.

If it were true that the motive power of the Chinese people is the desire of material acquisition, they alone could not be entrusted with the administration of justice to foreigners.

No effective system of administering justice can be built solely on the basis of "honesty being the best policy," since the material results of adopting such a policy are too remote for the man bent on present personal gain: a remote undefined benefit from rendering justice cannot offset an immediate benefit offered for withholding it; the administration of injustice is fruitful of opportunity for acquisition.

Historically the Chinese Court has not been a Hall of Justice. Many hundreds years ago a memorial was refused, which prayed that the corruption of the Courts be checked, and an edict was issued by the Emperor of the day which recited that the Chinese were naturally a litigious people, and that this fact was a great evil: it concluded that, if a man go to Court, it is well that he should be mulcted in all that he has.

If in China the unit be the family, rather than the individual, any system of administration must be encumbered by the "family inefficients," of the man who has the power of appointment. One of the chief officials of the Senate—a Western-educated man—was asked by the writer how he dealt with the question of appointments, which were demanded by his family. He replied that though he personally was opposed to family appointments, his mother believed in them, and "concessions had to be made to her view."

If one turns from administration of justice by the Chinese to administration in other departments, one finds that the Westerner believes that the same fundamental defects will destroy real efficiency. It was freely predicted in 1914 in China, that any railway taken over by the Chinese would ultimately be reduced to such a condition of inefficiency that camels would beat it in competition, that commodities would be delayed on the railways unless effective bribes were paid, and that money charged to "up-keep" in the accounts would find its way into the pockets of the

individuals administering the railway, while the railway property was allowed steadily to depreciate.

Such widespread beliefs—even if they be not accepted as facts of general application—must constitute a barrier to rapid change in so fundamental a matter as the administration of justice, and great caution will be exercised in removing the existing safeguard of Exterritoriality, though it imposes limitations on Chinese freedom of action.

China was of old likened to a soft rubber ball, readily yielding to pressure, but resuming its original shape immediately upon the removal of the pressure, but competent observers testify to the impress of Western ideas, during the last ten years, which may prove to be permanent in character. He would indeed, however, be a bold man who would yet advocate the relinquishing of exterritorial rights, without providing for some foreign administration in Courts which are to deal with the lives and property of foreigners, and also some well-defined body of law to be applied in them, as Westerners resident in China would be unwilling to submit themselves and their property to the administration of justice solely by the Chinese Courts.

The Western investigator of Chinese affairs is always struck, both by the difficulty of ascertaining facts in China, and also of presenting the Chinese conception in terms of the Westerner. What may be to a Westerner a binding agreement may be to a Chinaman a pious belief or hope; what may be to the Chinese President a vagary of some young inexperienced men needing punishment, may be a solemn act of a Parliamentary Committee to the Westerner.

All endeavours suddenly to superimpose on a Chinese foundation a theoretically perfect Western law system, without regard to the existing facts in China will fail as ignominiously as did the attempt to engraft an English constitution upon China in 1913–14. It simply failed to fit any condition in China, and was utterly useless, though theoretically in itself a perfect constitution.

In spite of difficulties, facts in China must as far as possible be collected and set out for Westerners, and all those interested in China will be grateful therefore to Professor Willoughby, who, in his recent book *Foreign Rights and Interests in China*, has successfully collected and grouped such as can be ascertained. This book presents many salient features which any attempt at modification of exterritoriality must regard. It is a definite and successful endeavour to collect and present facts, leaving for future examination—possibly his own—questions as to the extent of China's dependence on foreign aid to put her house in order. He deals with such matters as existing foreign commerce, spheres of interest, concessions, Chinese debts and financial commitments, railway loans and foreign control, etc.

In his chapter on Exterritoriality Professor Willoughby examines its origin in China, and agrees with the view that it is based on treaty—the Treaty of Nankin in 1842 being the legalised beginning of exterri-

toriality—rather than on established International Law. In other words, agreement has evolved exterritoriality in China; cannot agreement cure its defects?

The Chinese Government is to a great extent dependent upon foreign loans for which the Customs Service and the Salt Gabelle have offered a sound basis; both of these services are only acceptable security owing to the fact that they are under foreign domination and administration, and Western bankers would be chary of floating such loans if that control were absent. In these splendid services the Chinese themselves participate, though they have been established and maintained in face of difficulties by the indomitable character and probity of Westerners.

It is perhaps to these services that the future must look for guidance in framing any departure from the present system of administration of law for foreigners. The American or English lawyer would naturally look also to the American Federal Judicial Code, which provides for removal of causes to the Federal Courts where through diverse citizenship, etc., prejudice or local influence is feared—and generally to the British Code for China and United States State Codes in framing a code of substantive law to be administered—as well as to Chinese law.

It is conceivable that a single International Court, with appropriate subordinate District Courts, might be established in China, with power of removal to itself of causes in which foreigners are involved, enforcing its own code of law, somewhat on the model of the Federal Court in America, with criminal as well as civil jurisdiction, and that the Chinese could participate in such a Court. It is also conceivable that under the auspices of such a Court a body of law might grow up and gradually be adopted into the Chinese law, as the *jus gentium* was adopted into the Civil Law of Rome.

If in this age of agreement among nations, such a single Court can be established by the Treaty Powers, and a body of law be evolved which fits the real conditions in China, exterritoriality in its evolution, far from being a curse, may influence the Chinese Courts, and prove ultimately to be the means of spreading throughout the land the best conceptions of justice in East and West.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

Fishery Rights in Quebec.—The judgment of the Judicial Committee in *Attorney-General for Canada* v. *Attorney-General for Quebec*[1] marks a further step in the slow process of defining the precise nature of the Dominion and the Provincial rights over Canadian fisheries. In *Attorney-General for Canada* v. *Attorney-General for Ontario*,[2] and *Attorney-General for British Columbia* v. *Attorney-General for Canada*[3] the vital distinction was affirmed between the proprietary rights of the Provinces and the power of regulation vested in the Dominion, and in the latter case it was held that, as the common law is applicable to British Columbia, and as under that law the right of fishing in tidal waters and the sea was a public right, the regulation of that right belonged solely to the Dominion Parliament. The Provincial Legislature, on the other hand, could deal as a matter of property with rights of fishing in non-tidal waters, subject to the Dominion power of regulation of these fisheries, which, however, did not extend to conferring proprietary rights. The Legislature could also authorise the fixing of engines to the *solum* above the low-water mark, subject to non-interference with the rights of the public to fish in tidal waters. The question of the proprietary right in the *solum* below low-water mark, and the three-mile limit was expressly left unanswered on the ground that questions of international law were involved, with which in the proceedings in question it would be inconvenient to deal. The answers thus given would, it is clear, have disposed of the issue, but for the fact that the common law is not applicable in the main to Quebec, and the Court of King's Bench in Quebec, to which the question was referred for an opinion by the Lieutenant-Governor in Council, held that the earlier case did not decide the issue, and that, under the law of Quebec, the Provincial Government was entitled to grant exclusive rights of fishery in the tidal waters of Quebec, and in the sea up to the three-mile limit. This judgment has now been declared wrong by the Judicial Committee on a very simple and clear ground. Without deciding whether, on the conquest of Quebec, the royal prerogative ceased to be governed by French law and became regulated by English law, the Committee relied on the Act passed by the Parliament

[1] [1921] A.C. 413.

[2] [1898] A.C. 700. Compare *Attorney-General for Quebec* v. *Attorney-General for Canada*, [1921] A.C. 401.

[3] [1914] A.C. 153.

of Canada in 1865, under which, as under earlier legislation, the public right of fishery in tidal waters is asserted. Since the British North America Act, 1867, the sole power of modifying such a right rests with the Dominion Parliament and the Legislature of Quebec, like that of the other Provinces, has only such powers to deal with fisheries as rest on proprietary rights; it can deal with non-tidal fisheries, and with the use of the *solum* above low-water mark, in connection with tidal fisheries, but not so as to interfere in the latter case with the public right of fishery. Moreover, even as regards non-tidal fisheries the Dominion possesses paramount powers of regulation which may almost indefinitely infringe on provincial rights.

The Status of Dominion Companies.—The judgment of the Judicial Committee in *Great West Saddlery Co.* v. *The King*[1] is a brilliant example of the skill of the Committee in analysis of the British North America Act, and of the extraordinary complication of the Canadian Constitution. The six appeals consolidated in the judgment were all based on the issue of the true interpretation of the principles laid down by the Committee in *John Deere Plow Company* v. *Wharton*,[2] and the judgment reverses decisions of the Supreme Court of Canada, and of the Appellate Courts of Ontario, Manitoba and Saskatchewan. In all the cases the vital question raised was the extent to which the Dominion could confer powers on companies so as to prevail over provincial legislation. The Provinces have only the power to create companies with provincial objects, and therefore it rests with the Dominion alone to create companies with power to carry on their business throughout the Dominion. The Provinces, in the exercise of their powers must, it is now decided, respect the status conferred by the Dominion, and this restriction clearly raises questions of the utmost delicacy. How far may a Province insist on a Dominion company registering itself in the Province, or taking out a licence to carry on business? The Judicial Committee's decision shows that there is no simple answer. The Province may impose the duty of taking out a licence as a means of raising a direct tax for provincial purposes, or of securing the observance of some restriction as to contracts binding on the public generally, or of causing the doing by the public generally of some act of a purely local character only under licence. But it cannot use a system of licences as a means of indirect taxation,[3] or of impairing the capacity of a company under Dominion law, nor can it penalise a failure to take out a licence by forbidding a company to sue in the province. Similarly, a Province may require a Dominion company to register, and to pay fees not exceeding those levied on provincial companies, as a legitimate means of obtaining information and levying taxation, but it cannot enforce registration by forbidding

[1] 37 T.L.R. 436.

[2] [1915] G.C. 330.

[3] *Brewers and Maltsters Association* v. *Attorney-General of Ontario*, [1897] A.C. 231, per Lord Herschell at p. 237.

an unregistered company to enter into contracts or sue in provincial Courts, for it would thus be denying the company a status granted by the Dominion. On the other hand, any Province may enact a general mortmain law, under which corporations may be restricted as to the holding of land, and, when such an Act exists, as in the case of Ontario, the provisions of the provincial legislation are not overridden by the general power given by the Companies Act of Canada to Dominion companies, to hold and acquire real estate in connection with their business operations. These principles are clearly valid, but their application offers endless possibility of conflict, and their existence is a further reminder of the complications inseparable from a federal constitution incapable of easy amendment.

Ecclesiastical Law in Quebec.—The decision in *Despatie* v. *Tremblay*[1] illustrates admirably the value of the Judicial Committee as the final Court of Appeal in the case of issues affecting the status of the Roman Catholic Church in Quebec. The facts of the case, which had raised much interest in Canada, are simple. The parties were members of the Roman Catholic Church, who in 1904 were duly married according to the rites of that Church, by their own *curé*. In 1910, at the instance of the husband, the Roman Catholic Bishop of the diocese declared the marriage null and void, on the ground that it had been ascertained that the parties were cousins in the fourth degree, a fact of which they were, not unnaturally, ignorant at the time of the marriage ; and that under a decree of the Lateran Council of 1215 a marriage of cousins so related was invalid, unless a dispensation had first been obtained. On the strength of this ecclesiastical pronouncement, and of the relationship, the husband claimed in the Superior Court of Quebec a declaration of the nullity of his marriage, and the declaration was granted by that Court and affirmed by a majority in the Court of Review. By a widespread and unfortunate misunderstanding, the decision was treated in other Provinces of Canada as if it were an assertion of the supremacy of the ecclesiastical law over the civil law ; in point of fact, the decision was based on the interpretation put on Article 127 of the Civil Code of Quebec, which, in effect, provided that impediments to marriage recognised by the different religious persuasions, so far as they were not expressly dealt with in the Code, remained subject to the rules hitherto followed in the Churches. The Court held that the effect of this provision was to embody in the civil law the ecclesiastical rule that a marriage of fourth cousins where no dispensation had been obtained was invalid.

This result was obviously strange, and it is not surprising that the Judicial Committee should have reversed the decision, and have found that, save as expressly enacted in the Code, no marriage can be declared null and void on the score of ecclesiastical law. From the constitutional point of view the importance of the case lies in the clear exposition of the position of ecclesiastical law in Quebec. When Canada was ceded

[1] 37 T.L.R. 395.

to the British Crown, the regime then in force, under which Protestants were not even tolerated, came at once to an end, and the disabilities imposed by Imperial Acts on Roman Catholics would have extended to the people of Quebec, but for the stipulations made in their interest in the terms of cession, and given legislative effect by Imperial Act.[1] From this and subsequent legislation alone are the rights and privileges of Roman Catholics in Quebec derived. It is necessary, therefore, to discover in some legislative enactment a provision providing for the nullity of marriages of the type in question, and no such enactment has ever been passed. Up to the enactment of the Civil Code the only restriction on inter-marriage was, accordingly, that enacted in the Statute 32 Henry VIII, c. 38, which forbids marriages within the Levitical degrees, as is also done by the Civil Code. A marriage between persons within other degrees, if disapproved by the Roman Catholic Church, need not be celebrated by a *curé*, but, if celebrated, it is valid in law.

There is nothing in the decision that is absolutely new, but unquestionably it makes explicit a fact which in the Courts below was hardly appreciated at its true value: the cession of Canada involved the substitution for a State with the Roman Catholic as the established Church of a State with the Church of England as the established Church; a complete intolerance of Protestants was succeeded by a generous, but still definitely limited, tolerance of the Roman Catholic Church. The powers of that Church in Quebec are not to be gathered from its authority in France before the cession; in the domain of civil law as opposed to conscience they must rest on the precise term of enactments by one or other of the Legislatures which from time to time have had power to legislate for Quebec.

The Nature of Canadian Federalism.—Few judicial *dicta* have evoked more controversy than Lord Haldane's famous effort[2] to prove that the constitution of Canada is not a true federal constitution in the sense in which that character may be ascribed to the Commonwealth Constitution. Lord Haldane's position must be admitted to have proved indefensible,[3] except on an arbitrary restriction of the meaning of the term "federal," and his pronouncement as made *obiter* in an Australian case cannot weigh seriously against decisions of the Judicial Committee in Canadian cases in which the true federal character of the Canadian constitution is assumed.[4] A constitution is not to be denied to be federal because the federal Legislature is granted the residuary power in lieu of it being reserved to the Provinces, and, though it is legitimate to point out the difference in this regard between the Constitutions of

[1] 14 Geo. III, c. 84, s. 5.

[2] *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co., Ltd.* (1914) A.C. 237, 252–4.

[3] See W. P. M. Kennedy, *Canadian Historical Review*, ii. 106–25.

[4] E.g. *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*, [1892] A.C. 437, 441, 442.

Canada and of the Commonwealth, it is a common error to forget that the practical difference between the extent of the powers of the Canadian Provinces and the Australian States is very limited.

There is, however, as Professor Kennedy, the most recent and effective of Lord Haldane's critics, reminds us, one point of importance on which debate is yet proceeding. If Lord Haldane's view is accepted, and the Canadian Constitution is a fresh grant, we are no doubt entitled to disregard any arguments not based entirely on the British North America Act. When, therefore, the power of disallowance of provincial legislation is accorded by the Act to the Governor-General, *i.e.* to the Dominion Government, we may deduce that the power was intended to be exercised, and that the Dominion Government is charged with the duty, as it has the power, to disallow any provincial legislation which offends against the moral principles approved by the Dominion Government of the day. The Canadian Minister of Justice under the present regime has not shrunk from acting on this theory in practice, thus negativing the view to the contrary always maintained by Sir A. Aylesworth under the Laurier regime. While it is easy to sympathise with Mr. Doherty's dislike of the semi-confiscatory legislation now unfortunately sometimes approved by provincial legislatures, it is difficult to doubt the wisdom of the older precedent; disallowance is a clumsy and ineffective weapon, and it has the supreme demerit that it weakens the moral responsibility of legislators by permitting them to trust to another source, the duty of satisfying themselves of the justice of what they enact, and seeks to perform a function of control which justly appertains to the electorate. Mr. Doherty's action, indeed, has clearly failed to find general approval in Canada, and it may be assumed that, in future, the Dominion Government will follow the lead set by Lord Milner in 1920, when he declined to disallow the confiscatory legislation of Queensland. The only legitimate use of the power of disallowance seems to lie in the convenience which may exist in thus disposing of an enactment clearly *ultra vires* the Province, when injury might result from leaving the measure to be declared null and void by the Courts.

Inter-Imperial Enforcement of Judgments.—The provisions of the Administration of Justice Act, 1920,[1] for the reciprocal enforcement of judgments in the United Kingdom and other parts of the British Dominions, fulfil somewhat tardily the recommendation on this score made by the Imperial Conference of 1911. It is an interesting proof of the diversity of legal conditions in the Empire that it has been impossible to devise any system for the automatic enforcement of judgments. The registration of a judgment obtained in a superior Court overseas in the High Court is subject in every case to the discretion of the Court, and there is therefore an important divergence from the procedure in regard to the enforcement in England of Scottish and Irish judgments.[2] Impor-

[1] 10 & 11 Geo. V, c. 81, ss. 9–14.

[2] Judgments Extension Act, 1868 (31 & 32 Vict. c. 54).

tance attaches from the point of view of the conflict of laws to the list of cases in which registration of judgments is not permitted, for it throws a clear light on the English doctrine of the conditions under which foreign judgments generally should be recognised.[1]

In the main these conditions are reproduced in the Act without alteration. Thus, no judgment may be registered if it was obtained by fraud or was in respect of a cause of action which, for reasons of public policy, or for some other similar reason, could not have been entertained by the English Court, a provision which will exclude judgments in revenue cases, or in respect of gambling losses. Moreover, no judgment may be registered if an appeal is pending or is intended to be brought against it, although an ordinary foreign judgment may be sued upon in these circumstances, subject to the power of the Court to stay proceedings pending the result of such an appeal. More important, however, and not free from obscurity, are the provisions as to the jurisdiction which will justify the registration of a judgment. It seems clear that jurisdiction is recognised in every case in which the judgment debtor was duly served with process within the territorial jurisdiction of the original Court, and further that in any case in which the debtor was not carrying on business, nor ordinarily resident within the jurisdiction, and did not appear voluntarily or otherwise submit, or agree to submit, to the jurisdiction of that Court, the judgment cannot be registered. Further, even if the debtor was ordinarily resident or carrying on business within the jurisdiction, or had agreed to submit to the jurisdiction, a judgment cannot be registered if he was not duly served with the process and did not appear. It seems to follow that jurisdiction is recognised as existing in the case of any person ordinarily resident or carrying on business, or who has agreed to submit, provided always that process has been duly served, and we must assume that due service in these cases includes service without the jurisdiction so long as it is sufficient to bring the case effectively to the notice of the defendant, for no doubt would exist as to the jurisdiction if service could be effected locally. Thus, for purposes of enforcement of judgments rendered in some part of the British dominions, English law has recognised, what it refuses to accept in the case of ordinary foreign judgments, ordinary residence or carrying on business as a ground for jurisdiction.

The concession is interesting, and may have been intended to supply in the case of the British Dominions the place of jurisdiction on the score of nationality, which in theory is recognised by English Courts. There is still no distinction of British nationalities on which jurisdiction could be founded,[2] and ordinary residence or carrying on business even in the case of foreign countries might well be regarded as a far more reasonable basis of jurisdiction than mere nationality. At any rate,

[1] See A. V. Dicey, *Conflict of Laws* (2nd edition), chap. xvii.

[2] See *In re Johnson*, (1903) 1 ch. 821, 832–5 per Farwell, J.; *Gibson* v. *Gibson*, [1913] 3 K.B. 379. Canada, of course, has recently decided to define Canadian nationality, but English law has not yet recognised the distinction.

the way is now open for the development of such a doctrine, and it will be interesting to see how far the Courts will give effect to it.

The Act evades, naturally enough, the vexed topic of divorce legislation, by confining the registration of judgments to such judgments as order payment of money, including arbitration awards when under the local law they are enforceable as if they were judgments.

Divorce Jurisdiction in India and the Dominions.—The decision in *Keyes* v. *Keyes*[1] asserts somewhat belatedly what has been recognised for many years,[2] the invalidity of divorces granted by Indian Courts to persons not domiciled in British India. Curiously enough, the *ratio decidendi* adopted was the rather strained view that the Indian Divorce Act of 1869 could not be interpreted as sanctioning the divorce of persons not domiciled in India, because so to interpret it would be to make it *ultra vires* the legislative authority conferred on the Indian Legislature by the Indian Councils Act, 1862. The decision should rather have rested on the obvious fact that, as the jurisdiction was to be exercised on the principles followed in England, as soon as *Le Mesurier* v. *Le Mesurier*[3] made it clear that divorce jurisdiction depended on domicile, the Indian Courts should have followed the principle laid down in that case by the Judicial Committee. The validation by Imperial Act of the divorces hitherto granted under the Act of 1869 removes the immediate difficulty as regards India, but it leaves unsolved the question of divorces granted in Courts in the Dominions, for instance, in the case of deserted wives whose husbands have changed their domicile.[4] It is, of course, possible that divorces in these special instances might be regarded as valid by English Courts, for there are *dicta*[5] recognising the right of English Courts to grant divorce in such cases; but, failing this, the case may be met by legislation, though there are serious difficulties in the way of framing any legislation on a satisfactory basis.[6]

Act of State in British Dominions.—The decision of the House of Lords in *Johnstone* v. *Pedlar*,[7] on appeal from the Court of Appeal in Ireland is of great interest as determining in effect for the whole of the Dominions of the Crown the extent to which the doctrine of Act of State can be pleaded as a bar to proceedings by an alien in a British Court against officers of the Crown acting under the instructions of a responsible minister of the Crown. The respondent in the appeal was born in Ireland, but had been naturalised as a citizen of the United States. He

[1] 37 T.L.R. 499.

[2] *Responsible Government in the Dominions*, iii. 1240–5.

[3] [1895] A.C. 517.

[4] *E.g.* in New Ireland, *Poingdestre* v. *Poingdestre*, 28 N.Z.L.R. 604.

[5] See *Niboyet* v. *Niboyet*, [1878] 4 P.D. 1, 14 per Brett, L.J.; *Armytage* v. *Armytage*, [1898] T. 178, 185, per Gorell Barnes, P.; *Ogden* v. *Ogden*, [1908] P. 46.

[6] Compare the Matrimonial Causes Bill of 1921, clause 10, which aims also at meeting the difficulty raised in *Stathatos* v. *Stathatos*, [1913] P. 46 and *De Montaign* v. *De Montaign*, (1913) P. 154.

[7] *The Times*, June 25, 1921.

returned to Ireland, and, after taking part in the disturbances of 1916, was at last arrested on May 1, 1918, while engaged in illegal drilling, for which offence he was sentenced to a term of imprisonment and recommended for deportation. When arrested, the respondent had in his possession £124 in cash, and a cheque for £4 15*s.* 6*d.*, which the police seized and detained, the detention being formally ratified by the Chief Secretary for Ireland acting in his capacity as a minister of the Crown. The respondent then took proceedings to secure the return of these items of property, and succeeded in obtaining a majority decision of the Court of Appeal in Ireland in his favour, and it was from this decision that the appellant, the Chief Commissioner of Dublin Metropolitan Police, came to the House of Lords.

The decision turned on the question whether it was a sufficient defence to such an action to allege that the property was detained as an Act of State, and that the claimant was an alien. The House of Lords had no difficulty in affirming the doctrine that the plea was bad, and that an Act of State can only be alleged against an alien in respect of an action done outside the British Dominions, in accordance with the doctrine laid down in *Buron* v. *Denman*.[1] Their Lordships cited with approval the famous decision in *Walker* v. *Baird*,[2] which established that the plea of Act of State is not available against a British subject, and insisted on the fact that the alien while on British territory owes a local allegiance which carries with it obligations as well as privileges, including the protection of the Courts against tortfeasors, and they held, therefore, that the plea adduced in the case before them was bad as an answer to the claim.

The decision, however, leaves unsettled the very difficult question, which was not actually brought before the House of Lords, of the rights of the Executive Government apart from statute against an alien who, temporarily resident in the country, engages in treasonable acts against the State. An alien cannot in any way relieve himself of his local allegiance so as to be able to evade punishment for any act of treason committed by him while on British territory, But has he the same rights, if he engages in a treasonable act, as has a British subject, natural born or naturalised? Can he claim against the servants of the Crown the status of a subject of the Government which he is endeavouring to subvert? The judgment of Lord Finlay emphasises the apparent unfairness of any such claim, but there is something to be said on the other side. If it be held that an alien is bound by the ties of local allegiance, is it just to deprive him of the advantages of such allegiance? Should a man be liable to be treated at the pleasure of the Government as if he were a British subject, or as an alien pure and simple? It would seem that it is wiser to hold fast to the doctrine of local allegiance rather than introduce an element of injustice and caprice, and to provide by statute any further restrictions on aliens rather than invoke against

[1] 2 Ex. 167. [2] [1892] A.C. 491.

them the mysteries of an Act of State. The doctrine of local allegiance, it must be remembered, is far from unfavourable to the Crown; it has been held that an alien is guilty of high treason if he assists his own countrymen when in occupation of British territory in which he was residing at the outbreak of war,[1] and an alien enemy, despite the protection afforded him by law, is liable to be interned at the pleasure of the Executive as a prisoner of war.[2]

[*Contributed by* PROFESSOR HARRISON MOORE.]

Crown Colony Government.—An article on Crown Colony Government in the Caribbean in *The Nineteenth Century and After* for April 1921, calls attention to the little that has been done in the way of systematic exposition of the working of Crown Colony Government as compared with that of Parliamentary Government in the colonies. For this, no doubt, there are many reasons. The fact that Parliamentary Government is essentially government by discussion provides abundant published material for the constitutional student, while in the case of the Crown Colonies the material will, to a far greater extent, be restricted to official files, not generally accessible. Another reason is that the study of government has not made a great appeal to British students, except those aspects of it which may be summed up in the terms "civil, political and religious liberty." In these circumstances, attention may be called to an essay by Mr. Edward Sweetman, M.A., of the University of Melbourne, on "Constitutional Development of Victoria, 1851–6" (Whitcomb & Tombs, Wellington, N.Z. and London). Victoria was not, of course, a "Crown Colony" in the technical sense. Its Government was prescribed by Imperial Acts, and its Legislature was as to two-thirds of its members elected. But from 1851 to 1856 it had this in common with Crown Colonies—that its principal officials were appointed by the British and not the Colonial Government, that, though in some cases they might be members of the Legislature, it was as nominees of the Crown, to whom alone, and not to the Legislature, they were responsible. That in such a Government, executive officials, if not nominated, may not seek election as members, is best illustrated by a case earlier than the period covered by Mr. Sweetman. In 1844 Sir Thomas Mitchell, Surveyor-General of New South Wales, not having been nominated, sought and obtained election as a member of the Legislative Council of the colony. In a few months he resigned, in circumstances sufficiently explained in a despatch from the Secretary of State, which contains the following statement of principle:

> If Her Majesty's officers think fit to assume relations and responsibilities disqualifying them for the support of Her Majesty's Representative, they are, of course, perfectly free to do so, but, having done so, cannot be per-

[1] *De Jager* v. *Attorney-General of Natal*, [1907] A.C. 326.
[2] *Ex parte Weber*, [1916] 1 A.C. 421.

mitted to retain their employment; otherwise, there would not only be a end to all concert and subordination in Her Majesty's service, but the sincerity and good faith of those by whom it is administered would be brought into serious discredit. (Quoted, Jenks's *Government of Victoria*, pp. 122–3.)

The objects Mr. Sweetman had in view in examining this pre-responsible government period was to ascertain how far the ground was being prepared for the impending change by the practice of Government and the relations of the Executive of the Legislature. The "test questions" are set out in the Introduction, and it may be worth while to recapitulate them in the belief that they may be useful to students engaged upon similar tasks in relation to other places.

What were the relations between the Governor and his principal Executive officers? How far did they collectively form a body of advisers determining policy? To what extent was the Executive Council a Council of officials? How far was it the practice to include officials or Executive Councillors among the nominee members of the Legislative Council? Did the Executive Councillors or the officials in the Legislative Council act collectively as does a Ministry, or separately as do individual members? Had those nominee members of the Council who were neither officials nor Executive Councillors freedom of action, or were they a "Government party" expected to support the Executive? Did the Executive "lead the House"? Did the Legislative Council, in addition to making laws and imposing taxes, claim to criticise the general administration? Were "votes of censure" known? Was a general Budget laid before the Legislative Council, so as to enable it to review the whole expenditure of Government, including that part of the expenditure which it did not directly control? Were there any cases in which appointments to the Executive Council were made with a view to securing the support of the Legislative Council, or any in which a man ceased to hold office, or to be a member of the Executive Council, or was removed from the Legislative Council, in deference to the opinion of that Council? In making appointments to the Executive Council, did the Governor ever make a choice from the elective members of the Legislative Council.

It is to answering this class of question that Mr. Sweetman has directed his researches, and his book is an interesting account of the way in which people who are familiar with Parliamentary Government tend to turn political institutions of a different kind towards that type.

The rule governing the conduct of Crown Colony officials who have been nominated as members of the Legislative Council was laid down by the Secretary of State in 1882, in view of certain actions by officials in Jamaica. The Legislative Council consisted wholly of nominee members, of whom half were executive officials and half non-official. Under a judgment of the Supreme Court of Jamaica, the Governor, Sir Anthony Musgrave, has been cast in heavy damages at the suit of one Pulido, whose ship had been detained (wrongfully as the Court held) on suspicion of a breach of the Foreign Enlistment Act. (The case, as an appeal to

the Privy Council is familiar to constitutional students—*Musgrave* v. *Pulido*, L.R. 5 A.C. 111.) The case was plainly one in which the Governor ought to be indemnified by Government; but while the British Government held that the liability properly belonged to the Colonial Government, there was an almost universal opinion in the colony that the liability having been incurred for Imperial purposes, *i.e.* in view of the obligations laid upon the Empire to observe neutrality, and by the acts of officers appointed to be responsible to the British Government, the charge was one which ought not to be thrown on the colonial funds. The Governor was directed to prepare a vote to the Council authorising the payment, and the Secretary of State intimated that "official members would of course be directed to support the vote." A copy of this instruction was sent by the Governor to each of the official members. Thereupon, two of these members—the Auditor-General and the Crown Solicitor—resigned their seats on the Council as disagreeing with the proposal for which they were asked to vote. This being reported to the Secretary of State, he writes on January 1, 1882:

> The action taken by the two officers cannot be allowed to constitute a precedent, because it is necessary that the Government should be able to rely with confidence on the unreserved support and co-operation in the Legislative Council of all who hold official seats therein, and it will be desirable that henceforth in accordance with the principles in which the Legislatures of other Crown Colonies are constituted the official seats should be assigned to certain offices, and to the individuals who may for the time being be the holders of such offices, so that it may be clearly understood that an officer who is not prepared to support the Government will vacate his office as well as his seat in the Legislative Council. (Cd. 3453, Sess. Papers, 1882, vol. xlvi, p. 58.)

NOTES.

Adoption.—The Committee appointed by the Home Secretary under the chairmanship of Sir Alfred Hopkinson, to consider (1) whether it is desirable to make legal provision for the adoption of children in this country, and (2) if so, what form such provision should take, has issued a valuable report (Cmd. 1254, Stationery Office, 2*d.*). The Committee obtained evidence as to the laws of other countries, but they considered that little advantage would be gained by attempting to use the laws existing in different European countries as precedents with the possible exceptions of some provisions introduced by recent legislation in Scandinavia. The one fact which emerged was that adoption of children does receive legal recognition in almost all civilised States. On the other hand, the Committee attached great importance to, and believed that valuable assistance could be gained from, the consideration of recent legislation in English-speaking countries, particularly in certain British Dominions, and in the United States of America. Special reference is made to the law in Western Australia, and also to the account of the New Zealand legislation published elsewhere in this number. In Canada the legislature of British Columbia passed an Act last year to regulate the adoption of children. The Committee, however, in their own recommendations, have not followed the legislation of any one country, but have arrived at their conclusions on the evidence after considering and comparing the laws of other countries on the subject. The report, with its careful reasoning, should be read at length, but it may be useful to add the summary of the recommendations :

"(1) That an Act should be passed to give legal recognition to the adoption of children carried out in the method prescribed and to secure that the adopter and the adopted child should have rights and duties *inter se* similar to those between natural parents and their children.

"The Act should make provisions as to (*a*) judicial sanction to be required for such adoptions, the County Courts being the tribunal for this purpose and the High Court having concurrent jurisdiction ; (*b*) the consents to be obtained and the conditions to be fulfilled before adoption is sanctioned ; (*c*) the effects of adoption as regards the rights of the parties both as to property and otherwise.

"(2) An amendment of the Children Act, 1908, so as to secure notification and supervision of "adoptions" which do not receive formal legal sanction.

"(3) The legitimation of children born out of wedlock by the subsequent marriage of their parents, as recommended in our interim report.

"We consider that the above three questions are urgent. As soon as they have been dealt with by separate Acts we recommend further:

"(4) That the whole legislation relating to children should be taken into consideration, amended as may then be necessary, and consolidated."

The Medical Service of the Supreme Bench of Baltimore.—The Medical Service in connection with the Courts of Baltimore City began some five years ago, when, at the suggestion of several judges of the Supreme Bench of Baltimore City, the position of Medical Officer was created, which was filled by Dr. John R. Oliver, a member of the staff of the Phipps Psychiatric Clinic of the Johns Hopkins Hospital. Until recently, the Medical Service had no appropriation from any public fund, and Dr. Oliver was compelled to work alone. Prior to 1920 the organisation was purely the creation of the Supreme Bench, but in that year the Medical Service was established by Act of the State Legislature, and an appropriation secured. The latter enabled Dr. Oliver to make a complete reorganisation of the office, to have the services of an assistant, and to double the possibilities for service.

The Medical Service was to act as "the watcher at the gate of the Criminal Court" to prevent any person, mentally irresponsible or seriously ill, from passing into penal institutions, thus freeing the prisons from mentally disturbed persons, the feeble-minded and from those badly balanced personalities to whom prison discipline does no good, and who should be cared for as sick people rather than criminals, and who should be placed in proper institutions. The Service was founded upon lines somewhat broader than those of the two older services in Chicago and Boston, which are more intimately connected with the purely mental side of the question. Not only does this Service take cognisance of mentally deficient delinquents, but it takes in all medico-legal matters of every description. In all cases of possible homicide, the autopsy is either made by Dr. Oliver or in his presence, careful notes are made, and a report is submitted directly to the chief prosecuting officer and parties concerned in the case requiring such. Assistance is rendered the police in many ways, such as the investigation of blood-stains, footprints, etc. The Medical Officer is also frequently called into the Civil, as well as the Criminal Courts, as the Court's expert on various questions, such as the credibility of a witness, the possible limits of pregnancy in bastardy cases, the wage-earning abilities of men involved in non-support cases, and in any cases in which the science of medicine can be applied to the solution of legal problems.

In addition to "the watch at the gate" referred to above, the physicians at the various penal institutions refer cases to this office which come to their attention while making daily inspections. These institutions are again combed by trained social workers of the Prisoners' Aid Association of the Baltimore Alliance of Charitable Agencies. Thus,

a double check is maintained which rarely fails to note the few cases which " ease " through " the gate."

A physical and mental examination is made of each case, after which a report of the findings is submitted to the Court in which the case is assigned, and copies are also submitted to the Prosecuting Attorney for the State, the Prisoners' Aid Association, and to the prisoner's attorney. This is the usual routine, though, quite frequently, the Medical Officer is called to testify as to his findings.

A Medical Service has also been established in connection with the Prisoner's Aid Association, of which Dr. Oliver is also Chief Medical Officer. This Service deals with the physical and mental condition of all persons before the Courts for trial and of all persons who, after serving their sentences, are released in its care. It also forms a connecting link between the Court Medical Service and the physicians who are in charge of the penal institutions. In this way the mental and physical conditions of accused persons are covered from their arrest, through their trial and prison sentence, down to and including the time of their release and of their readaptation to the social life of the community.

Maintenance.—The Maintenance Orders (Facilities for Enforcement) Act, 1920, provides for the enforcement in England and Ireland of maintenance orders made by a Court in any part of His Majesty's Dominions outside the United Kingdom to which the Act extends. The Legislatures of the undermentioned Colonies having made reciprocal provision for the enforcement in those Colonies of maintenance orders made by Courts in England and Ireland, an Order in Council was issued on May 27, 1921, extending the Act to Grenada, Leeward Islands and Mauritius. A further Order in Council was issued on June 27, 1921, extending the Act to Malta and the Straits Settlements.

Proposed Amendment of Tenancy Law in Oudh.—Mr. Sabonadière writes: " One of the most interesting proposals now pending before any of the Legislatures in India is the bill to amend the Oudh Rent Act, which has been introduced in the Legislative Council of the United Provinces. The bill is almost certain to give rise to much controversy when its details come to be considered. In most of the land of Oudh the ordinary tenant is secured a tenure for at least seven years by the present Act, and a landlord desiring to eject a tenant at the end of such a term has to pay a heavy and irrecoverable court fee. The Act also limits enhancements of rent either to the sitting tenant or to a new-comer when such a term runs out. In the rest, and much smaller part, of the land of Oudh the tenant, unless of the limited class of occupancy tenants, has no protection at all. The enhancement limitation is habitually evaded by a system of premiums exacted by the landlords. The bill proposes to substitute ten instead of seven years for the term of unbroken holding, and to give the tenant the right to hold on thereafter for life, subject to revision of the rent by the Court at the end of each ten-year term, and it also provides for periodical inquiries for the

fixation of fair rent rates for each class of soil in each district or other local area. All this is excellent. But the bill proposes considerably to enlarge, or to allow the landlords to enlarge, the area in which tenants have no protection, to create a controversial class of "undesirable tenants" whom the landlord can move the Court to eject at any time, the Court to have discretion in this matter, and to allow the landlord to eject at any time on the real or pretended ground that he wants the land for certain personal or outside purposes. If he makes a show for just over two years of carrying out those purposes the tenant will be permanently got rid of. It remains to be seen how these provisions will fare in Committee of the Legislative Council.

The Taxation of Excess Profits in Great Britain.—"With all its imperfections, we may perhaps say of it what was said of the Laws of Solon, that though not the best in itself, it is the best which the interests, prejudice and temper of the times would admit." Such was the comment of Adam Smith on the system of Corn Laws, and so may the financial student of to-day regard the taxation of Excess Profits, especially as a means of providing the sinews of war.

In view of the controversy which has centred round this particular form of taxation, it is particularly interesting to have the unbiased views of a broad-minded, disinterested commentator such as Professor Haig, whose report was published as a Supplement to the December 1920 issue of *The American Economic Review*.[1]

In 1919 the War Finance Committee of the American Economic Association decided to send a Special Commission to Great Britain to study the system of taxation on Excess Profits in vogue. The Commission was unable for various reasons to come to England, but one of its members, Professor R. M. Haig, of Columbia University, undertook the work single-handed, and although in England for less than six weeks during 1920, he has produced a report which will take high rank in the list of scholarly productions by fiscal students.

The Report begins with an examination of the causes which led to the favourable reception granted to the first Excess Profits Duty Enactment in 1915. The idea of a levy on Excess Profits provided a strong appeal to Labour generally, while the general public hoped that the measure would have a restrictive influence on profiteering.

Professor Haig then proceeds, in the second section of the Report, to an exceptionally well-informed description of the interpretation of the law by the Inland Revenue Department, and compares the methods adopted by the English Revenue officials in dealing with problems similar to those which had caused difficulty in America. He incidentally points

[1] The Taxation of Excess Profits in Great Britain—A Study of the British Excess Profits Duty in relation to the problem of Excess Profits taxation in the United States. A Report prepared for a Committee on War Finance of the American Economic Association, by Robert Murray Haig, Ph.D., Associate Professor, School of Business, Columbia University, assisted by Geo. E. Holmes of the New York Bar.

out how the British law has eliminated hardship as far as possible by an ample supply of "cushioning," and contrasts unfavourably the inelasticity and inflexibility of the American system which failed to make sufficient provision for abnormal cases.

The third section of the Report is devoted to an examination of the administrative machinery, and, in view of the popular prejudice against bureaucracy, it is interesting to note the high praise tendered by this impartial investigator to the Inland Revenue officials generally. He is amazed at the wide discretionary powers conferred on the administrative officials, and, after contact with officials of the Inland Revenue, with accountants whose practice brought them into close touch with the administration, and with taxpayers, is filled with admiration for the efficient manner in which the machinery is operated, and the general satisfaction it has given. He, moreover, points out that the British system was more thoroughly planned in its inception—the system in vogue there now being fundamentally the same as that introduced in 1915, while the American system has undergone very considerable revisions in the course of its career.

The next section of the Report deals briefly with the effect of the Excess Profits Duty. Professor Haig is very guarded in his statements here, and has not dealt with the relative superiority of the American system regarded from the "ability" standpoint. After quoting from speeches of prominent statesmen and financiers, he remarks:

"It is freely asserted that the duty has been an important influence making for high prices, but the best informed opinion appears to hold that the tax has been, in most cases, the excuse for, and not the true cause of, the increases in prices."

He also calls attention to beneficial effects which have been incidental to this duty, namely, welfare work, the improvement of industrial housing, and the scrapping of out-of-date plant, all of which measures were the result, probably, of a desire to escape a portion of the duty.

The volume can be heartily recommended to any student of finance who desires to obtain a brief but thorough review of the British system of Excess Profits Duty taxation.

Financial Support of Hospitals in the Dominions.—Although it has been determined to maintain the voluntary system of financing the hospitals of the United Kingdom, it may not be without interest to record the arrangements in other parts of the Empire. Broadly speaking, there are two main systems—one in which the State or the local authority is the predominant partner and enlists the co-operation of voluntary subscribers upon the management, and the other in which the State has given legislative authority to the work of voluntary bodies and supplemented their funds. In the former system the financial basis is a State grant at a rate *per diem* upon the basis of the number of days' actual treatment and stay of each patient. In the latter system the State's contribution is on a scale according to the amount of the voluntary

contributions from different sources. It seems to be clear, therefore, from the Dominions' experience, that the grant on the basis of occupied beds involves the larger amount of external control leading by a short step to the supersession of voluntary control by an arrangement in which bureaucracy exercises the predominant part.

It is worth while to note that in England the moneys at present received from the State and local authorities are devoted to special objects, *e.g.* venereal diseases and professional education, and are not given by way of contribution to the cost per bed of maintaining the hospital.

The two systems are represented respectively in Canada and Australia. In Canada the local authority predominates, and in Australia the underlying principle of the legislation appears to be an endeavour to strengthen and supplement the work of the voluntary hospitals. In Victoria, for example, the control is vested by statute in a committee elected by the subscribers of whom not more than one-fourth may be honorary medical men on the staff of the institution. The corresponding New South Wales Act specifies that in order to be entitled to vote, the subscriber must have contributed at least £1 in the preceding year or £10 in one sum. The State contributes an amount equal to the private annual contributions on condition that the Government, through Police Magistrates or other approved officers, have the right to recommend the admission of patients. In South Australia the Government is represented on the governing body in the same ratio as the State contribution to the total income, *i.e.* one-half or two-thirds. Western Australia has a similar but more elaborate arrangement, while in Queensland a converse arrangement is in operation whereby the subscribers have representation in accordance with the total amount of their contribution.

While the system in New Zealand is primarily one of State control, the financial arrangements are directed to encourage voluntary generosity. The particulars are set out in the Hospitals and Charitable Institutions Act, which provides that the subsidy shall not exceed:

" (*a*) Ten shillings for every pound value of all devises or bequests.

" (*b*) Twenty-four shillings for every pound of the value of all contributions or gifts of money, land or other property, other than devises or bequests;

" (*c*) For every pound levied by the Board from contributory local authorities, under the provisions:

" (i) One pound in respect of capital expenditure;

" (ii) An amount determined in accordance with an elaborate schedule in respect of expenditure other than capital expenditure."

The subsidy is not to exceed £500 in respect of the estate of a single testator. It has been found that this system of subsidy, which was devised to assist the poorer Hospitals Boards, has not been successful in that respect. The voluntary contributions in the last year for which figures are available only amounted to £17,963 out of a total income

of £668,584. In the Australian States the proportion of voluntary contributions to total income is substantially higher. In New Zealand also it is thought that more effort should be made to obtain payments from patients, and that a uniform fee is desirable throughout the Dominion. So far as can be traced in the numerous reports and statutes which have been obtained from the Dominions, there is no official corresponding to the Lady Almoner. It is clear that the primary object of her work to prevent people from pauperising themselves is as much, if not more, necessary under a State system than it is under a voluntary system.

Under both systems there is generally an inspector, who is primarily connected with the medical side of work, but New Zealand has a lay inspector whose duty it is "to inspect and report upon methods of purchase and use of supplies; to report upon the stores system in vogue, test the same, and, where necessary, make a stores audit." He reports upon any waste or extravagance and suggests methods whereby economy can be ensured, obtaining the necessary information, to enable comparative costing statistics to be prepared. He also investigates and reports on the office organisation and accounts, and sees that up-to-date methods are followed. He also examines the efficiency of the staffing on the domestic side of the institution. Generally, the objects of his appointment are to promote efficient and economical administration of hospitals, especially in securing that those treated in them, who are able to do so, should contribute adequately to their support.

The New Zealand plan of financial subsidy is in operation in Cape Colony, where 30*s.* is given for every £1 of the value of all voluntary contributions or gifts of money other than devises or bequests, £1 for every £1 of the value of all devises or bequests, and £1 for every pound received as fees from patients, with a provision that the subsidy is not to exceed £500 in respect of the estate of a single testator.

In Canada the provision of hospitals follows broadly the same lines in the different provinces with the exception of Quebec, where note may be made of an Act devoting the entertainment tax in Montreal to their support. In Ontario the Province does not contribute to any hospital more than the amount of the municipal grant for its maintenance, and no sum is paid in respect of paying patient. Alberta contributes 50 cents per day for each patient, and half that sum for paying patients. Nova Scotia pays 30 cents for each day's actual treatment and stay of a patient in such hospital up to 1,500 dollars, and thereafter at the rate of 20 cents. During the past few years the attention of the Legislatures have been directed to the provision of hospitals and medical attention in country districts. The organisation is generally entrusted to Hospital Boards elected or appointed for the purpose.

The circumstances in this country differ widely from those prevailing in the Dominions, but human nature is much the same all the world over, and when once the stream of aid from taxation or the rates begins

to flow, then it is difficult to maintain the supply of the milk of human kindness represented by the contributions and work voluntarily given to the maintenance of the hospitals.

International Aspects of Public Health Questions.—The present century has witnessed a marked tendency to recognise that many questions connected with the public health require international co-operation for their effective handling, and the institution of the League of Nations has served to show a tendency which had been acquiring force during the generation which preceded the Peace of Versailles.

Attention has been directed to the importance of distinguishing between those public health questions which appear to demand consideration from the international standpoint for effective administration and those which, like many scientific, legal, and social problems, are advantageously studied and discussed with that many-sided approach that the views of different nationalities are sure to supply.

A paper [1] read by Sir William Collins to the Kensington Branch of the League of Nations on December 3, 1920, sought to survey International Health Questions from the point of view of the League, and an address by Dr. G. S. Buchanan on February 18, 1921,[2] to the Society of Medical Officers of Health, envisaged International Organisation in the light of Public Health.

In both these papers the objects, the machinery and the limits of international activities in regard to health questions are investigated, and the work already achieved by the League of Nations recorded. The continuance and extension of the work of the Sanitary Conventions of 1892 to 1912, the international notification of infectious diseases, the campaign against typhus, hours of labour and employment of women and children, naval hygiene, vital statistics, the control of traffic in dangerous drugs, were duly passed in review as well as the co-operation of the League of Nations with voluntary agencies such as the Red Cross Societies whose encouragement and promotion are by Article 25 of the Covenant especially confided to that organisation.

The Monthly Summaries of the League of Nations, non-officially issued from Geneva by the Information Section thereof, enable us to judge of the progress so far attained by the new machinery at work in relation to the public health.

A perusal of these summaries serves to remind us that progress in organisation, when some forty different Governments are concerned, and some important countries are not included, is necessarily slow, and that *post bellum* machinery has to be adapted to *ante bellum* activities which were already in partial occupation of the field.

Thus, the setting up of a permanent health organisation by the League was delayed by diplomatic efforts to secure official consent of all the Powers which were party to the Rome Sanitary Convention of

[1] Published in *The Hospital*, April 30 and May 7, 1921.

[2] Published in *The Lancet*, vol. i, 1921, p. 415.

1907 to merging the work of the *Office d'Hygiène* in Paris with the new and extended activities of the International Health Organisation of the League at Geneva. The abstention of the United States from the League and any of its Commissions and Committees, has retarded the inauguration of even the Provisional Health Committee which the Council of the League, at its meeting in Paris in February and March last, decided to set up.

As regards the other " humanitarian question," the official " Monthly Summary " of the League records the work of an advisory committee on the traffic in opium and other dangerous drugs, which met at Geneva in May. It is amiably remarked that " it seemed to the committee that the Hague Convention (Opium) had not been put into practice everywhere." Although the Opium Convention of 1912 came into force, nominally, in January 10 of this year, it would be more correct to say that it has not as yet been put into practice anywhere. It is of the essence of the Convention that all nationalities producing or using the dangerous drugs in question shall mutually co-operate in restricting them to medical and legitimate purposes only. This objective is far from attainment even in those countries which have done most towards putting the Convention into operation, and indeed the efforts of each are largely dependent for success on the co-operation of all.

A lengthy *questionnaire* is being issued either through the League or the Netherlands Government to all the Powers, whether within or without the League, the replies to which will not be available for six months. It is hoped that by February next the Council of the League may be moved to take action " to render more efficacious and even to reinforce the stipulations of the Hague Convention."

Thus, it will be seen how slowly it is possible to proceed, even with urgent reforms dealing with vital questions of health, when the Governments of some forty or fifty Powers have to be brought into line.

The Criminal Code of St. Lucia.—" The Criminal Code of St. Lucia, 1920, represents the codification of all laws up to 1920 on the subjects of general crime and criminal procedure. In fact, it is a combined Penal and Criminal Procedure Code. The Ordinance of 1918 made several additions to, or alterations in, the then existing law, and it then directed that both these, and all intermediate amendments made by various Ordinances since the last codifications of the Penal and Criminal Procedure Laws, should be incorporated in a single Criminal Code, together with what was left of those former codifications. Mr. J. E. M. Salmon, Registrar of the Royal Court, was entrusted with this task, and was given power to make all necessary consequential amendments, and to propose other minor amendments, which were to be specially reported to the Legislative Council, and not to be incorporated in the Code until approved by it. The final text as approved by the Legislative Council and the Governor was to come into force as the new Code, and the amendments made in 1918 were not to take effect until

then. The task was completed in 1920. It appears that the Canadian Code, and those of Bermuda, St. Vincent, and the Transvaal have been drawn upon fairly freely in compiling the new Code. The result" writes Mr. Sabinadière "is a work of considerable magnitude. Mr. Salmon has performed the huge task allotted to him with great care and efficiency. But of necessity there is much repetition in a Code which attempts to incorporate without much alteration in detail a large part of the common law of England relating to crime. When Macaulay and his colleagues drafted the India Penal Code they had the courage to see that for the purposes of a Code the principles of English law were unsurpassable, but that its details were so complex that a Code embodying them would be far too lengthy for every-day use. Besides which, it would be no more easily comprehensible than the uncodified law which it was intended to simplify. So this new Code for St. Lucia shows in practice how great are the difficulties of codifying the criminal law of England as it stands. This does not require us to reason that it would not be a good thing to codify that law. Much of it is so scattered between the common law and divers statutes, that it is a matter of difficulty to know what the law on any given point is, and how the liability comes in, and where a breach of duty is made punishable. Partial codification would be no remedy. If there is to be a Code it must punish everything punishable which is not left for treatment in special or local laws. Bearing these considerations in mind, one can understand why the St. Lucia Code is open to criticism as unduly prolix, too full of detail, and not provided with enough broad statements of principle. The difficulty is a double one. For two procedures, or indeed three, commitment, summary trial, and trial at Assizes, have to be dealt with, and the example of English law is followed in dealing with each fully and separately. Whereas there is much common to all three which need have been stated only once in titles applying to all trials. Then at various points of the Code there are provisions which more properly belong to a Law of Evidence. For instance, the provision that a witness can be called on to answer an incriminating question which is directed to show that he is untrustworthy or partial, with a guarantee that his answer is not to be used in any prosecution against him except one for answering such question falsely, is as fairly applicable to a civil trial as to a criminal proceeding. But presumably, the Law of Evidence has not been codified in St. Lucia. But the general impression given by the Code is that it is a good Code, well expressed, and much more understandable of people with merely a fair lay education than is the criminal law of England."

Social Hygiene.—Professor Levi's earnest plea, in an interesting monograph,[1] is for a larger and more effective control by States of social hygiene. The vital importance of national health has suddenly

[1] *La Medicina Sociale in difesa della vita e del lavoro.* By Professor Ettore Levi, 1921. (Roma, Soc. Anon. Editrice *La Voce*).

been revealed to the States at the close of the last war when thousands of cripples were left, destitute and helpless, to the care of public assistance. This has been followed by a general revival of social legislation, having, for its basic principle, the modern conception that collective needs must prevail over personal and particular interests, and that Society has the supreme right to defend and promote the welfare of the national stock.

The infectious character of the greatest and most insidious enemies of humanity—tuberculosis, alcoholism and venereal diseases—renders it imperative that the campaign for their prevention and cure should be undertaken, under a joint scheme, by all the nations of the world.

After summarising, in an open letter to the late Sir David Henderson,[1] the results of his research, Professor Levi urges the creation of an International Institute for the diffusion, by propagandist pamphlets, of the elementary rules of social hygiene. Special attention should be given by the Institute to the study of comparative legislation, and of the various systems of State assistance in order that the efforts of the different nations may be co-ordinated and their work carried out in strict harmony and co-operation.

Mandates.—In the *Journal* for October, 1919 (vol. i, p. 175) the late Professor Goudy contributed a note on the legal aspects of "mandate." The ordinary textbooks on International Law, including Calvo's *Dictionnaire de Droit International*, appear to know nothing of the name as a technical description of any international status or government, though analogies may perhaps be found in the position of some parts of the Turkish dominions as defined by various treaties, as, *e.g.* the government of the Lebanon under the Protocol of 1861, or Cyprus under the Treaty of 1878. In such cases, however, the territory does not cease to be a part of the Turkish dominions, and probably for any legal purpose no serious difficulty in determining the matter of sovereignty would arise. Only two cases are known to the writer in which, prior to the Peace Treaty, "mandate" has been definitely invoked *eo nomine* in international relations for the government of territory. One of these, curiously enough, is in regard to one of the territories now "mandated" by the Treaty of Versailles. At the Washington Conference of 1887 between Great Britain, the United States, and Germany on the affairs of Samoa, the Germans propounded a scheme whereby the administration would be carried on by a native government, with an adviser to act as "the mandatory of the three Powers." The adviser was to be nominated by Germany, as the Power with preponderating interests, subject to the approval of the other two Powers (see *British and Foreign State Papers*, vol. lxxix, p. 904). The scheme came to nothing.

A much more striking case is that of Crete in 1898. In three cases the term "mandate" is used so frequently and in so formal a manner as

[1] Director-General of the League of Red Cross Societies.

to suggest that it was already a technical term with precise and definite implications. The case may be examined in volume xcii of the *British and Foreign State Papers*, pp. 1224 *et seq.* In the course of the negotiations proceeding at the Courts of the several Powers the suggestion was made that Prince George of Greece should be appointed High Commissioner " under a joint mandate " from the Powers (see *Despatches of the British Ambassadors at St. Petersburg* (pp. 1224–5) *and Rome* (p. 1226). The suggestion seems to have originated in the Italian Foreign Office, which proposed a temporary mandate for two or three years for the regulation and pacification of the island. The sugggestion bore fruit, for shortly afterwards we find Lord Salisbury setting out the conditions of appointment agreed to by the Powers, of which the first was that " the High Commissioner will have a temporary mandate of three years for the pacification of the island and the establishment of a regular administration." A Memorandum was then prepared for submission to the King of Greece, by which the Governments of Great Britain, France, Italy, and Russia inform His Majesty of the proposal to offer to Prince George the mandate as High Commissioner for the pacification of the island and the establishment of a regular administration, and ask his permission for the acceptance of the mandate by the Prince (p. 1232). This Memorandum was presented by the diplomatic representatives at Athens at an audience, and His Majesty replied: " I authorise my son to accept the mandate which the Powers desire to commit to him in nominating him as High Commissioner." A formal offer was then made to the Prince, begging him to accept the mandate under the terms set out, and the Prince replied accepting the mandate. Finally, the Proclamation by which Prince George assumed the government refers in terms to the mandate of his appointment.

The case, it will be noted, differs from those under the Peace Treaty, since the mandate is conferred upon an individual and not upon a State or Government. Notwithstanding this, it has an analogy to the Class C mandates of the Peace Treaty, for in substance, it is the recognition of the preponderating interest of a neighbouring State. In both cases the *mandatores* are several, and to them the mandatory owes responsibility. A significant alteration made in the draft form of appointment of the High Commission for Crete makes this clear. The first draft provided that " the High Commission will govern under the suzerainty of the Sultan " ; this was changed to " the High Commissioner will recognise the suzerainty of the Sultan " (pp. 1228–9).

The recent decision of the Judicial Committee of the Privy Council on *Native Reserves in Southern Rhodesia*, has an interesting reference to mandates in a matter which presents a sufficient analogy to international relations to have drawn from their Lordships the statement that the matters referred to them must be dealt with from a broader point of view than any suggested by the terms of art peculiar to municipal law.

The conquered territories of Matabeleland and Mashonaland were

administered by the British South Africa Company under an Order in Council. The Company did, in fact, grant titles to land and receive payment therefor. But their Lordships held that the Crown had never parted with its title to the Company, and the Company therefore was liable to the Crown for the price and rents so received. But on the principles of mandate the Company was entitled to reimbursement for expenses properly incurred in administration, and might therefore be credited with the proceeds of land alienation applied to this purpose.

The Housing Problem in Egypt.—One of the most striking results of the war (writes Sir Malcolm McIlwraith, in the economic field, is the great upheaval it has occasioned in the building trade, and in the problem of housing the population in general. In almost every country in Europe the difficulty of finding accommodation became more and more acute as the war proceeded. The causes of the phenomenon were, of course, patent and easily to be foreseen. Building operations which, under normal conditions, are never interrupted, from one year's end to another, became impossible, throughout a long period of years, both because of the ever-increasing difficulty of imports and transport of materials, and because labour for civilian building operations was unprocurable. In Paris, for instance, where, in normal times, some 7,000 flats (" appartements ") are built, every year, occupying some 1,500 timber-yards in that city, the latter were reduced in September 1920 to 50. Nor were such conditions confined to Europe. Even in so rich a city as New York, where the general effects of the war have been comparatively little felt, it was recently stated that some 500,000 persons were awaiting the provision of houses, the construction of which the present fantastic price of steel prevented.

In Egypt the building and housing crisis has been less acute—in proportion to the population—than in other countries. Indeed, to the general causes above indicated must be added a considerable increase in the population of the country which rose in the last decade for which statistics are available (1907–1917) from 11,287,359 to 12,750,918. There has been, moreover, a marked tendency for the rural population to flock into the towns, the population of Cairo, for instance, rising in the above-mentioned period from 654,476 to 790,939.

The result was a sudden and enormous rise in rents, which, if allowed to continue unchecked, would have made it practically impossible for the poorer classes to find lodgings of any kind.

Legislative intervention in such a question of economic delicacy is notoriously dangerous, but most countries have had to undertake it, and France, England, and Italy have all dealt with the problem of legislation. It was found necessary to follow these precedents in Egypt, and two recent numbers of that able and interesting periodical *L'Égypte Contemporaine* (December 1920 and February 1921) contain a full account of the genesis and development of the legislative measures taken in that country to cope with this thorny problem.

The law first promulgated was No. 11 of 1920, applicable to " dwelling-houses " (habitations) in all the towns and localities subject to house-tax. Its main provision was that, from the date of its promulgation, the maximum rent allowed was that provided in the lease or agreement at the date of August 1st, 1914, plus 50 per cent. Certain exceptions were allowed, however, where such rent was exceptionally low, either by reason of the personal relations between the landlord and the tenant, or because, since August 1914, the landlord had effected substantial improvements.

The law also provided that the landlord could no longer eject the tenant save by permission of the judge, and on the ground either that the rent had remained unpaid for fifteen days after an official demand for it had been made, or that the premises had been improperly or illegally misused or were being otherwise damaged.

This law gave rise to many and bitter complaints and criticisms on the part of both landlords and tenants. The landlords complained that the permissible increase of 50 per cent. was inadequate, and that the rise in rents should correspond to the rise in the cost of living, which far exceeded 50 per cent. The tenants maintained that rents are merely the return on capital invested in land or buildings and must not exceed the normal rate of interest allowed, which, in Egypt, is limited by law. The landlords further complained that, under this legislation, a house-owner was no longer able to give notice to quit to his tenant even when he wished to occupy his property himself, or to instal in it a member of his family. They also pointed out that the law raised a serious obstacle to the improvement of residential quarters, where, in many cases, far more accommodation could be forwarded by the demolition of small, insanitary dwellings and the construction of new and greatly enlarged premises.

On the other hand, the main grievance of the tenant class was that the law of 1920 dealt only with the rent of dwelling-houses, and provided no remedy against the exorbitant rents which were being demanded for shops and other business premises.

Ultimately the Egyptian Government decided to appoint a Legal Commission to study all these questions and make recommendation for the revision of the law. This body, which was composed of three Europeans and three Egyptians, reported on December 29, 1920, and its very interesting report is given in full in the Review above quoted. The result was the new law—*No. 4 of* 1921—which has endeavoured to solve satisfactorily the above and many other difficulties. It has made no change in the fundamental principle of the 50 per cent. maximum over the pre-war rent. It is, however, of a temporary character, and is to remain in force for a year only, till June 30, 1922.

The Institute of Advanced International Studies.—Under the auspices of the International Juridical Union, the French Academy of Moral and Political Sciences and the Law Faculty of the University of Paris, a

school for the study and teaching of International Law has recently been established in Paris.[1]

Two special features characterise the new Institute. It is intended, in the first place, to provide a highly specialised educational centre for the study of International Law and related subjects. In the second place, this teaching will be imparted by the most competent professors and statesmen of all nations. The school will thus represent the different doctrines and systems of the world.

Besides affording an international centre of research and scientific progress, the Institute has also among its direct aims:

(1) To participate in the reconstruction of international law which should now be moulded in strict harmony with the actual exigencies of States and the strenuous conditions of modern life;

(2) To emphasise the moral influence of the ideas of right and justice in the formation of international law;

(3) To develop feelings of good understanding and solidarity among the members of the League of Nations;

(4) To educate public opinion on matters of foreign policy by the extended diffusion of the principles of international law.

The creation of the Institute appears to be particularly appropriate at the present time when the old European nations are undergoing a process of evolution and transformation, new States are being established, and numerous Treaties offer themselves for interpretation. The services which the Institute is destined to render can hardly be over-estimated, as it is on the existence of an enlightened and world-wide knowledge of international law that the future peace and prosperity of mankind will largely depend.

Mixed Arbitral Tribunals.—Arrangements have been made for the publication of a series of reports of the decisions of Mixed Arbitral Tribunals. These Tribunals have been established under the Treaties of Peace to adjust private property rights and interests between nationals of the Allied Powers, and nationals of the Central Powers, and they mark an important development in the administration of private international law. The first monthly Part of this series, enti ed *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, and published in Paris (Librairie de la Société du Recueil Sirey) reached England during the summer. The reports are vouched for by six presidents of Mixed Arbitral Tribunals, including Professor Borel, President of the Anglo-German Tribunal, and by *L'Office Français des Biens et Intérêts Privés*, and have a strong editorial committee. The principal contents of this first instalment are a list of the Tribunals already set up, and rules of procedure issued by three of them. But some early decisions of the Franco-German Tribunals are also to be found there. The questions in dispute between French and

[1] The *Institut des Hautes Études Internationales* was formally opened by M. Millerand, President of the French Republic, on April 19, 1921

German nationals are so many that it has been found necessary to establish more than one Tribunal to deal with them. The judgments of these Franco-German Courts, relatively more numerous than those of other Tribunals, will doubtless be widely cited before the Arbitral Tribunals in this and other countries. But the editors of these reports by no means intend to limit themselves to French decisions, and later parts will contain British, Italian, and other judgments. It will then appear whether these judgments are to be printed in French or in the language in which they were delivered. The editors have tried the experiment of printing head-notes to the cases in three languages—French, English, and Italian. Legal French, legal English, and legal Italian are each full of technicalities, and few enjoy facility of expression in more than one of these languages. This is apparent in the English of the head-notes. But English readers who are familiar with other languages extend to the series the warm welcome which it deserves.

The Mesopotamian Mandate.—Dr. C. J. Colombos supplies the following note:

In a remarkably well-written monograph[1] Mr. Campbell Lee discusses the Mandatory System created by Art. XXII of the Treaty of Peace with Germany, 1919 (Part I, the Covenant of the League of Nations). This article introduces several novel ideas into international politics and international law. The tutelage of the people inhabiting the former German overseas possessions and certain parts of the Ottoman Empire is entrusted, under it, to advanced nations who "by reason of their resources, their experience, or their geographical position, can best undertake this responsibility."

Great Britain having been selected as Mandatory for Mesopotamia, Mr. Balfour submitted, on December 7, 1920, to the Council of the League of Nations, for its approval, the British Draft Mandate.

Mr. Campbell Lee, after a scholarly review of the terms of the Mandate, shows that this new status cannot be understood except by the aid of that most characteristic of legal institutions, the English principle of Trust. Both Roman and continental law are unable to provide a solution for the application of the rules of private Mandate to the international Mandate adopted by the Covenant of the League of Nations. It is only in the English law of Trust that the exalted idea of unremunerated service can be found, and that the duties of a trustee can be made to fit so closely into the scheme of mandatory government established by the Versailles Treaty.

The same spirit of trusteeship has guided British colonial policy for the last one hundred years, and explains adequately how the leaders of this people—a people not free from self-interest—have been able to bring together and keep together during these years the most wonderful

[1] *The Mandate for Mesopotamia and the Principle of Trusteeship in English Law*, by D. Campbell Lee, M.A., LL.B. Being the Rhodes Lecture delivered at University College, London, on May 23, 1921.

aggregation of self-governing, non-tributary nations the world has ever seen.

The author ventures, however, upon debatable ground when he asserts that the sovereignty of the mandated area is in suspense pending the creation of the new Arab State. It is difficult to admit the existence, in international law, of any suspended sovereign rights. A scrutiny of the powers assigned by Art. XXII to the League of Nations leads to to the conclusion that sovereignty is collectively vested in the several States composing the League of Nations, and that it is exercised on their behalf by the Mandatory until such time as the mandated territories reach full maturity and independence.

The mandatory system has been recently criticised by some publicists as being merely a disguise, in pleasant and palatable words, for imperialistic designs of conquest and annexation. Mr. Campbell Lee emphatically denies this accusation, and proves that the disinterested and progressive administration now being carried out by Great Britain in Mesopotamia is a complete refutation of all the charges advanced against her. There is no doubt that the intention of the British Government in accepting the Mesopotamian Mandate has been to undertake, in all good faith and sincerity, " a sacred trust of civilisation for the well-being and development " of the Arab people.

NOTICES OF BOOKS.

THE EVOLUTION OF PARLIAMENT.

The late F. W. Maitland's seminal mind is always producing new fruit, and it has recently produced rich fruit in Professor A. F. Pollard's *Evolution of Parliament.* Professor Pollard first achieved eminence as an historian by his studies of the Tudor period in England, and of the Reformation period of European, and especially of German, history. After having held the chair of constitutional history at University College, London, he was, in 1908, elected to a fellowship at All Souls' College, Oxford, on condition of pursuing researches suggested by Maitland. The result was a series of lectures delivered partly in England, partly in the United States, and now worked up into his latest book. He modestly describes his book as less a history of Parliament than a suggestion of the lines upon which it should be written, and rather an indication of the research that is still required than of that which has yet been accomplished. It is for the specialist to criticise and to place its proper value on the research and learning embodied in this volume. To one who is not a specialist it appears to be the most comprehensive, most suggestive and ripest study which has yet appeared of the subject with which it deals. Professor Pollard is an ardent admirer of Maitland, a disciple, but not a servile follower, of his master. He has struck out his own lines of inquiry and research, and has tested and illustrated his master's teaching by the more recent writings of such men as McIlwain, McKechnie and Baldwin. And he has inherited much of his master's charm of style. His pages sparkle with epigrammatic and felicitous phrases, and there is not a dull page among them from cover to cover.

To the critics of parliamentary institutions who do not content themselves with repeating the old formula that parliamentary government is on its trial, but declare, more confidently, that it is doomed to die and deserves to die, the author replies by reminding them that the political institutions which stand the test of time are organisms subsisting upon their adaptability to their environment, and ever-changing with the conditions of their existence. The venerable Mother of Parliaments, whose progeny, under different names and with different shapes, have extended over the whole world, has undergone many changes in her past, and is doubtless destined to undergo many changes in her future. But that is no reason for chanting premature dirges over her funeral.

Professor Pollard is cheerful and hopeful about the future. His

attitude as a critical historian towards the beliefs and theories of the past is boldly, though perhaps not unduly, challenging and aggressive. He summons up for trial and sentence some of the most cherished and venerable traditions of English constitutional law and constitutional history. Listen to what he says at the opening of his second chapter:

> Four ideas, at least, with respect to the foundations and functions of English Parliaments have become firmly rooted in the popular mind. One is that their principal object has ever been the making of laws; another is that hereditary peerage and popular representation were indispensable elements in their original constitution; a third, that they have always consisted of two houses; and a fourth, that they were based on three estates. Like all conceptions that have been firmly grasped by the multitude, these impressions about the history of Parliament are hardly less false than true; and it is the purport of these pages to show cause for thinking that Parliaments in their infancy were much that Parliament to-day is not, and little that it is; that legislation was not the original purpose of their being; that they existed before they contained any representative elements; that there was a time when, if Parliaments comprehended a peerage at all, that peerage was not in Parliament by hereditary or any other right than royal grace; that Parliament was at first a single chamber; that there was no "house" of Lords until after the close of the Middle Ages; that the "house" of Commons was not an original part of Parliaments, but yet is older than the "house" of Lords; and that the notion of three estates—so far from being the fundamental principle upon which Parliaments were built—was borrowed from abroad, and hesitatingly applied in the third century of English parliamentary history to an institution to which it was foreign in spirit and in practice.

Then follow chapters with such significant titles as "The Myth of the Three Estates," and "The Fiction of the Peerage."

What is the meaning, or rather, what are the various meanings and changing imports of such terms as "estates," "status," "state"? How far do they correspond with anything which existed in the time of Edward I? Why three estates, and what are they? When did this "trinity" first come into vogue? How was it that in the eighteenth century Charles James Fox, and, apparently, English statesmen generally, gave a definition of the three estates which, nowadays, would be condemned as an elementary blunder? These are some of the "posers" with which Professor Pollard confronts us.

It is on the peerage law that he pours his chief scorn. "The Law of Peerage," he says, "is a modern monument of legal fiction." Of course, what history knows to be fiction may be quite sound law. In the realm of law *magna est fictio et prevalebit.* But the authority of fiction in law, as of dogma in theology, is always liable to be sapped by the application of the historical method. Study of the birth and growth of beliefs, customs and institutions throws much light on the possibilities and probabilities of their decay and death—or develop-

ment. The application of the historical method to such a problem as the reform of the House of Lords might have an explosive effect.

The chief points on which Professor Pollard lays most stress throughout his book are, perhaps, two.

1. The mediæval Parliament was a conference—a big talk. Things were done in Parliament, not by Parliament. Parliament was, in the Middle Ages, a set of conditions under which men acted rather than the agent itself. Even to-day it is in theory the King in Parliament that enacts laws.

2. The functions that were performed in the mediæval Parliament were partly judicial, partly administrative, partly fiscal, a blend of the three, with a progressive tendency towards differentiation. But the judicial functions were earliest in date. Parliament was a Court, a term which has many meanings. And it began by being a Court of Justice, the highest in the land.

A series of chapters traces the gradual evolution of the different functions performed in and through Parliament. One of them discusses Montesquieu's famous doctrine of the separation of powers. This doctrine, it is argued, in agreement with a recent American writer,[1] is historically unsound and, though enshrined in the constitution of the United States, constitutionally mischievous. The aim of the British constitution in its gradual development, was, not the separation of powers, but the differentiation and specialisation of functions—a very different thing. And the Government should be treated, not as an enemy, but as a friend and servant of the people; not an enemy to be weakened by division, but a friend to be strengthened and employed for the benefit of the people. It is the people's best safeguard, not merely against anarchy, but against the undue predominance of private and special interests. If the American Government were stronger it would be more useful. So argues Mr. Bondy, and Professor Pollard apparently concurs. Their conclusions represent one facet of the truth.

In his last chapter, originally written in 1915, on "The British Realms in Parliament," the author advances beyond the comparatively safe field of history into the dangerous field of contemporary politics. He dislikes the terms "empire" and "imperial" as applied to a commonwealth, community or congeries of States, and thinks that "empire" implies an "unconstitutional authority, military domination and rigid uniformity," whereas "the essence of the British realms is government by consent, liberty and heterogeneity." He deprecates the phrase "imperial cabinet" as suggesting false analogies. He recalls the "big talks" of the thirteenth century out of which the modern Parliament was developed in England. He develops his view that the English Parliament was primarily a Court of Law, finds in community of law and legal tradition a better foundation of a commonwealth than race or religion, and points out that "a judicious admixture of Roman law and

[1] W. Bondy, *The Separation of Governmental Powers.* Columbia University, 1896.

other systems is not inadmissible, as we know from Scotland and South Africa." All these considerations point to a gradual, cautious, experimental advance towards that unity in diversity which is the common ideal.

Professor Pollard's book is one which no student of constitutional history can afford to overlook.

C. P. I.

AMERICAN FOREIGN POLICY.

FOREIGN policy means the principles by which the political relations of a State with other States are, and have been, guided. In such books as Mr. Arthur Hassall's *The History of British Foreign Policy from the Earliest Times to* 1912, published in 1912, and Professor H. E. Egerton's *British Foreign Policy in Europe to the End of the Nineteenth Century: a Rough Outline*, 1917, we find traced the course of events, the surrounding circumstances, the grounds on which any particular policy was adopted and maintained: whether it was, for instance, to meet the aims of Philip II, or Louis XIV, or Napoleon, at world-supremacy; whether England should intervene on the Continent, or abstain; what the Balance of Power should be; how far dynastic, or trade, or national considerations were at stake. British foreign policy has observed no code, but can be discerned in its historical applications or gathered from the speeches of Ministers, such as Chatham, Pitt, Castlereagh, Canning and Palmerston. Thus, there has always been a foreign policy of some kind, long before Hague Conferences or international tribunals for arbitration were designed. Whether such institutions are established or not, the circumstances of the world-wide British Empire will require England, in spite of her insular position, to have a policy towards other nations on the continents of the world. Foreign "questions"—disputes arising from British foreign policy—may hereafter be submitted to international tribunals, but that cannot mean that the latter will effect a termination of "foreign policy."

A volume[1] published by the Carnegie Endowment gives a very different account of American foreign policy, and of its final objective. That policy is embodied in the expression "the Monroe Doctrine" of 1823, and seeks its Nirvana, its absorption, in permanent International Courts for justiciable disputes, administering codified international law. Little is said of the history, either of American foreign policy, or of the earlier occasions on which the famous doctrine was asserted. George Washington, in September 1796, laid down the principle: "The great rule of conduct for us, in regard to foreign nations, is, in extending our commercial relations, to have with them as little *political* connection as

[1] *American Foreign Policy.* Based upon statements of Presidents and Secretaries of State of the United States and of Publicists of the American Republics. With an Introduction by Nicholas Murray Butler. Carnegie Endowment for International Peace. Washington, D.C., 1920.

possible. So far as we have already formed engagements let them be fulfilled with perfect good faith. Here let us stop." In the interests of America he advised aloofness. Jefferson (1801) was opposed to entangling alliances. Monroe, in December 1823, asserted that "the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonisation by any European Powers." He added: "With the existing colonies or dependencies of any European Power we have not interfered, and shall not interfere," and "Our policy in regard to Europe . . . is not to interfere in the internal concerns of any of its Powers," and (elsewhere) not to take part in the wars of the European Powers. Other Presidents confirmed the principle of respecting the existing rights of every European Power, while asserting the equally important principle that hereafter no territory on the American continent shall be regarded as subject of transfer to a European Power. On these grounds President Cleveland, in 1895, protested, in the Venezuela case, "against the enlargement of the area of British Guiana in derogation of the rights, and against the will, of Venezuela," and proposed arbitration. Theodore Roosevelt (1905) admitted that "an aggrieved nation can, without interfering with the Monroe Doctrine, take what action it sees fit in the adjustment of its disputes with American States, provided that action does not take the shape of interference with their form of government, or of the despoilment of their territory under any disguise." The fullest exposition of "The Real Monroe Doctrine" was made by Mr. Elihu Root, then ex-Secretary of State, in an address in April 1914, which is particularly interesting as showing succinctly the political circumstances in which the Monroe Doctrine of 1823 was originally declared (after the revolt of the Spanish provinces in South America, which Spain unaided was plainly unable to reduce to their former condition of dependence). Some remarks of Mr. Root's may be quoted: "No one ever pretended that Mr. Monroe was declaring a rule of international law, or that the doctrine which he declared has become international law. It is a declaration of the United States that certain acts would be injurious to the peace and safety of the United States, and that the United States would regard them as unfriendly"; and again: "The doctrine is not international law, but it rests upon the right of self-protection, and that right is recognised by international law." The sayings or writings of Secretaries or Presidents cannot, it is admitted, constitute a national policy. "It is the substance of the thing to which the nation holds, and that is and always has been that the safety of the United States demands that American territory shall remain American." It is not clear how Mr. Root could write: "The scope of the doctrine is strictly limited. It concerns itself *only* with the occupation of territory in the New World to the subversion or exclusion of a pre-existing American Government. It has not otherwise any relation to the affairs of either American or European States." Monroe had

written in 1823 that the American policy in regard to Europe was " not to interfere in the internal concerns of any of its Powers," or to take part in their wars. This work would have been more complete if it had been brought up to date and had shown the grounds on which America entered in 1917 into the Great War, how far America, through President Wilson, concurred in or deviated from the traditional and accepted policy of the Monroe Doctrine as a whole. The rest of the book consists of the part taken by America in the Hague Conferences of 1899 and 1907. Her aim has been the peaceful settlement of international disputes by the establishment of a permanent Court and the adoption of various Conventions regarding the rights of neutrals, etc. Their desirability may be admitted, but they can hardly be said to fall within the generally-accepted meaning of " Foreign Policy."

C. E. Buckland.

UNIFORMITY OF LEGISLATION.[1]

The movement towards uniformity of legislation throughout the civilised world on matters of common interest, which was brought to a standstill by the war, is once more making its influence felt. At the last Conference of the International Law Association at the Hague, an attempt has been made, with powerful support from the great business interests concerned, to arrive at an international solution of the vexed problem of the liability of shipowners for loss or damage to cargo. An obstacle, which has hitherto stood in the way of success in dealing with this and similar problems, has been the difficulty of reconciling the divergences in the fundamental conceptions on which the different systems of jurisprudence are based, so as to arrive at a solution which will be acceptable universally. It is now generally recognised that these systems fall into three great groups, the Anglo-American, Latin, and German-Scandinavian groups, to which the Mohammedan group may possibly be added. Although these systems have much in common, there has been little or no indication of any readiness to make sacrifices for the purpose of ensuring world-wide uniformity of legislation. For the present the best prospect of success would seem to lie in promoting uniformity within each group, and in the case of the English-speaking communities there would seem to be no insuperable difficulty in arriving at this result. Each of the component members of this group must, however, first of all put its own house in order, and it is satisfactory to note the considerable advance in this direction which is taking place in the United States and the British Overseas Dominions.

Mr. Terry's *Compendium of the Uniform State Laws* reveals the progress which is being made in the United States. It has been published under the auspices of the National Conference of Commissioners on

[1] *Uniform State Laws in the United States*, by Charles Thaddeus Terry. (New York, Baker, Voorhis & Co., 1920.) Proceedings of the Third Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, 1920.

Uniform State Laws, and contains the text of all the different Acts with very full notes. It is a book with a purpose. The scheme for homogeneous legislation on matters of common interest throughout the various States seems to depend for its continued success on compliance with two fundamental conditions. In the first place, it is essential that the Uniform State Laws should not be tampered with by indiscriminate statutory amendment by the various States, and further that the interpretation or construction by the State Courts of the Uniform Laws should proceed along identical lines so far as is possible. If these conditions are not satisfied the whole scheme might well prove to be abortive. In this respect Mr. Terry has rendered an invaluable service. The various Uniform Laws are collected together and carefully indexed, and the notes contain every reported decision of the Courts of any State which has adopted these Acts. There is also a table of cross-references showing the corresponding section numbers in the Statute Book of each of the States. It thus becomes possible for a judge or practitioner in any of the States of the Union to ascertain rapidly and without any difficulty how any question of interpretation or construction has been dealt with by the Courts of other jurisdictions, and the tendency to diverge from the common track will thus be kept in check. This volume will also form a welcome addition to the library of the student of comparative law, more particularly as regards comparative commercial law—a most important but somewhat neglected subject.

The demand for uniformity of legislation is also insistent in Canada. Business men having dealings throughout the Dominion are embarrassed by the existence of numerous provincial statutes, which are often contradictory and are always a source of irritation. This demand is capable of being met in either of two ways. The Dominion Parliament has the power under section 91 of the British North America Act to legislate with this end in view, but this course is inconsistent with the preservation of the true balance of a federal system. The Provinces are therefore seeking for a solution in the voluntary adoption of uniform laws. Many imperial statutes have already been adopted throughout Canada, with the exception of Quebec, *e.g.* the Sale of Goods Act, 1893, the Partnership Act, 1890, and the Factors Act, 1889. The Commissioners on Uniformity of Legislation in Canada are faced with the problem of dealing with the chaotic state of company law in the Dominion at present. The methods of incorporation vary, and there are also manifold differences both in company law and practice throughout the Provinces. The Commissioners appear to have grave doubts as to the feasibility of securing uniformity in this respect, but express the hope that it may be found possible to come to some agreement on the more urgent and important branches of this part of the law. It is interesting to an English lawyer to note that it is suggested that the doctrine of *ultra vires* should be abolished, and that there is a difference of opinion as to the advisability of adopting the Imperial Companies Act, 1908. The

question of limited partnerships has also been under discussion. The report of the Commissioners cites with approval the article on this subject by Mr. J. E. Hogg in the *Journal* of this Society ("Partnership Law in the British Empire," vol. xviii, New Series, pp. 233–41). The conclusion arrived at by the Commissioners is that there is no pressing need for legislation on this subject, although the present position is unsatisfactory in many respects. It may also be added that in some cases the proposed uniform legislation in Canada approximates more closely to the American than to the British model, as, for instance, the draft law regarding the conditional sales of goods. So far as Commercial Law is concerned, the time appears to be at hand when in all important respects there will be substantial uniformity in the laws of all the English-speaking communities, such an achievement is certain to be of the greatest value in facilitating the conduct of business by diminishing the uncertainty and irritation which is caused by the endeavour to comply with varying rules of law in the course of the transit of goods through different jurisdictions.

H. C. GUTTERIDGE.

A HANDBOOK TO ENGLISH LAW.[1]

L'OBJET de cet ouvrage est précisé en ces termes sur la couverture du livre : " This work aims at giving, in *simple* and *untechnical* language, a knowledge of those rules and elementary principles of the Law of England which should be known to every scholar—whether a boy or a girl—of fourteen years of age and upwards." Et l'auteur ajoute, à la fin de sa préface (page vi) : " The object of this commentary is not to make boys or girls into lawyers, but only to stimulate in them an interest in the laws of their own country."

Les directeurs du *Journal of Comparative Legislation* ont pensé, avec raison, que le livre de M. le Juge Ruegg pouvait présenter encore une autre utilité : il sont estimé qu'il était de nature à rendre service aux juristes étrangers, qui sont souvent très embarrassés d'aborder et d'étudier le droit anglais, et ils m'ont fait l'honner de me demander d'exposer ici aux lecteurs de *Journal* mon sentiment sur ce point.

Je dirai, en peu de mots, qui mon sentiment concorde absolument avec le leur.

A beaucoup d'égards, ce livre se recommande comme le *premier* au quel un juriste étranger, possédant la langue anglaise, mais totalement ignorant du droit anglais, devrait s'adresser pour en acquérir

[1] *An Elementary Commentary on English Law*, by His Honour Judge Ruegg, K.C., County Court Judge of North Staffordshire and Joint Judge of Birmingham. (George Allen & Unwin, Ltd., London : pp. viii + 194.)

une connaissance générale et en pénétrer l'esprit. Et même pour ceux qui se sont déjà initiés aux mystères de Common Law et de l'Equity, ou qui se sont risqués dans le labyrinthe du Statute Law de Angleterre, il constitue un résumé utile permettant de classer les idées dans un cadre clair, classique, accessible à tous.

J'ai particuliérement goûté les quatre premiers chapitres sur le droit anglais en général, ses principales divisions, l'organisation de Cours de Justice en Angleterre, et le personnel de la profession juridique. Il y a là des notions inconnus du droit continental, telles que les définitions du "Common Law," et de l' "Equity," si difficile à expliquer à des Français. Je me propose, à la rentrée de l'année scolaire 1921–1922, de faire traduire oralement à mes étudiants, en guise d'exercice scolaire, dans la "class-room" de droit anglais à notre Faculté de droit de l'Université de Paris, ces quatre premiers chapitres de livre de M. le Juge Ruegg.

Le Chapitre V (concerning personal rights) contient des passages également très intéressants pour un étranger (right to personal liberty, *habeas corpus*, self-defence, and its limits).

Quant ceux chapitres qui suivent, il y a lieu, pour un étranger, d'en faire deux parts.[1] Les chapitres relatifs à la *real property*, que l'auteur lui même annonçait comme les plus redoutables pour le lecteur (préface, p. vi), présentent très clairement des formes de propriété d'essence féodale aujourd'hui disparues dans la plupart des États continentaux ; l'intérêt qui s'attache à ces chapitres, pour un étranger (et notamment pour un Français) est donc d ordre *historique* et *scientifique*.[2] Les chapitres concernant la *personal property*, les contrats, les titres négociables, le statut domestique, les torts offrent, par contre, un puissant intérêt *pratique*, quoique l'originalité du droit anglais soit moins accentuée sur les divers points qu'en matière de propriété foncière.

Les deux chapitres qui terminent le livre, l'un visant le droit pénal (*concerning crime*), l'autre la procédure civile (the ordinary course of a trial), sont bien à leur place, et seront lus avec profit par tous.

Pour résumer mon impression, je dirai que l' "*elementary commentary.*" de M. Ruegg répond parfaitment à ce type d'ouvrages que nous appelons, en France, les livres de "droit *usuel*" (c'est à rie dont il est fait *usage* journellement) et j'ajouterai même que nous n'en possédons pas de modèle aussi réussi. De plus, il a l'avantage de mettre le droit anglais à la portée des étrangers, dans une langue savoureux, ornée de citations heureuses et aussi parfois d'anecdotes pleines d'humour (voir notamment, page 51, note 1).

S'il était permis, pour finir, de formuler quelque *desiderata*, je dirai (1) qu'un *appendix* très sommaire contenant l'indication des principaux livres de droit en usage en Angleterre serait de nature à rendre grands services ; (2) que tes règles de droit concernant la famille, la propriété, les contrats ne sont pas, pour mon goût, suffisamment accompagnées d'une explication rationelle ou sociologique. En exprimant cette réserve, je sois bien que je parle en m'inspirant d'idées francaises ; le Français

n'aime pas, en général, qu'on lui expose des règles de conduite aux quelles il dont obéir "*sans savoir pourquoi.*" Le peuple anglais est moins raisoner, sans cesser pour cela d'être raisonnable. Il y a là une différence de nos deux grands pays.[1]

Henri L. Lévy Ullman,
Professeur de législation comparée a la Faculté de droit de l'Université de Paris.

LIABILITY OF MENTAL DEFECTIVES IN CIVIL ACTIONS.

It has often been remarked as a curious fact that civil cases in which lunacy has been set up as a defence have been extremely rare, as opposed to the frequency with which it is an issue in criminal trials. Dr. Cook's exhaustive survey[2] has collected only some 200 cases. The reason is probably that persons already certified as lunatics are not in a position to do actions rendering them liable to civil proceedings, and those not certified are unlikely to risk bringing unwelcome consequences on themselves by raising this defence. There is indeed reason to suspect that lunatics not infrequently get into Civil Courts. If judges had the power to remand the parties in civil proceeding for a report by experts on the state of their minds, much valuable time and money would be saved, and the case law on the subject would be substantially enriched.

Dr. Cook's important study in psychological jurisprudence covers ground which has never been adequately treated in any modern work. His researches show that the law relating to the civil responsibility of lunatics is confused and obscure, and it rests largely on contradictory decisions based on dubious grounds. This is particularly apparent in the chapters on Tort and Contract. There is an irreconcilable difference of opinion between the school that holds that a lunatic is civilly liable for his deeds on the ground that "where one of two innocent persons must bear a loss he must bear it whose act caused it," and those who retort with Sir Frederick Pollock, "this decision is erroneous in principle . . . there was no real voluntary act at all." This "conflict of equity" is

[1] Entres autres remarques de dêtails, je me permet de signaler (page 9) la definition du Digest et des *Institutes* de Justinien. Le Digest, que M. Ruegg, représente comme, "a collection of Roman *Laws*," n'était pas autre chose qu'une compilation des livres classiques découpés pas extraits (un peu comme si, pour le droit anglais, on alignait des coupures des *textbooks of authority*, de Stephens, Pollock, Anson, etc., et on leur dormait force de loi). Quant aux Institutes, representées comme "really an elementary *code* . . . largely taken from a *Code of Law* by a former writer named Gaïus," ce n'étaient pas un Code, mais (de même que l'ouvrage de Gaïus) un "elementary *Commentary*" à l'usage des étudiants en droit de l'époque.

[2] *Insanity and Mental Deficiency in Relation to Legal Responsibility: A Study in Psychological Jurisprudence*, by William G. H. Cook, LL.D. (Routledge, 10*s.* 6*d.* net.)

of old standing, and it is not quite clear which view would be sustained by the Courts to-day.

In the chapter on Contracts the author argues that the judgment in the *Imperial Loan Co.* v. *Stone* to the effect that lunatics are estopped from pleading *non compos mentis* unless the other party knew of the insanity is inconsistent with the common law of England, and with the principles of equity. He holds strongly that lunatics should be as exempt from civil responsibility as they are from criminal. It may be urged, however, that this discrepancy between civil and criminal liability exists even in the case of sane persons. Any citizen who has accidentally injured another may well find that he has a good defence to criminal proceedings, but cannot escape the payment of damages. If Dr. Cook's contention is correct, and the lunatic is absolutely exempt from all responsibility, he is in a privileged position as compared with the sane.

The chapter on Testamentary Capacity raises many interesting problems of a medical rather than a legal nature, for the law is here clear enough. The difficulties arise from the generous rule of English law which allows testamentary capacity to the partially insane, provided that their mental disorder is not such as manifestly incapacitates the testator from making a rational will. In practice, the validity of a will made in such circumstances has usually turned on the highly technical question of the influence of a delusion or delusions on the testator's conduct. It is to be regretted that Dr. Cook has not brought his discussion on these points into line with modern psychological teaching. He rejects the old doctrine of "the unity and indivisibility of the mind," but his "faculty" psychology is itself obsolete, and the mind is no longer regarded as being divided into water-tight compartments. Some reference might with advantage have been made to modern research on the genesis of delusions, for it will make alienists, and one hopes judges, increasingly unwilling to declare in the dogmatic fashion of the past that any specific delusion could have no possible effect on testamentary capacity. It is now recognised that even a single delusion is not an excrescence on the surface of the mind without organic connection with other thoughts or emotions, but is a symptom of deep and possibly widespread mental disorder. Further, delusions cannot always be taken at their face value—they may be distorted or symbolic expressions of the real "false belief" which the patient is secretly cherishing.

Careful study of judgments in certain cases shows a startling lack of appreciation of the dangers of "blind intervals" and convalescent stages of insanity. The greatest caution ought to be shown in upholding wills made while the patient is still under certificate where there have *at any time* been delusions against *any* members of the family. For example, delusions of infidelity against a wife are very frequently accompanied by doubts—sometimes never expressed in direct form—about the paternity of one or more of the children. Long after definite delusions

against the wife have vanished (temporarily or permanently) the testator may retain an unreasoning dislike of the child which may easily express itself in unjust exclusion from the will. Again, there is a well-known stage in convalescence from insanity when the patient is free from definite symptoms but has an imperfect or distorted memory for the incidents of his attack. Consequently he regards his confinement as a wanton outrage, and conceives an intense hatred for the relative who was instrumental in having him certified—often a devoted son or daughter. If he is allowed to make a will at this time grave injustice may be done, yet the testator may fulfil all the tests of a " sound and disposing mind " which usually satisfy the Courts.

The book has a good Index and a valuable Appendix on the powers and duties of Lunacy Authorities. A helpful addition to a new issue would be a chapter on the civil responsibility of the feeble-minded, a quite untouched and very important subject which bristles with special difficulties of its own. There are now several thousands of persons, certified defectives under the Mental Deficiency Act, mixing with the general population under a loose " supervision " or " guardianship " who enjoy a freedom from responsibility equivalent to that of a lunatic if charged with the commission of a crime. Will it be held that " feeble-mindedness " confers the same immunity in civil proceedings? At present a man may escape liability for very grave crimes because of his mental defect, and yet a marriage contracted by him would be valid and not even voidable. It is by no means certain how far the rule would apply to other contracts. Again, defectives have been described as " permanent children," and, like ordinary children, are capable of much purposeful malice, especially when they know they are immune from punishment. It would appear inequitable that possible victims could obtain no civil redress.

In the discussion of these and many similar anomalies, both lawyers and medical men will look to the guidance of " liaison officers " such as Dr. Cook for the elucidation of the obscure territory on the border-line between the two professions.

LETITIA FAIRFIELD.

WAR AND NEUTRALITY.

BONFILS'S *Handbook of International Law*[1] has, since its first publication in 1894, taken a prominent rank among French legal classics, and has habitually been referred to as representing the view of continental jurists.

The present, eighth, edition, however, differs substantially from the last edition published in 1914 by M. Fauchille. The important international events which have occurred in the meantime, and the burning

[1] *Traité de Droit International Public—Guerre et Neutralité*, par Paul Fauchille. Huitième Edition du *Manuel de Droit International Public* de M. Henry Bonfils, 1921. (Paris, Rousseau & Cie).

questions revived by the Great War, have so much enlarged the text that it has been found necessary to divide it into two volumes and to change its title from *Handbook* into *Treatise*. Bonfils's original work has thus been almost entirely rewritten and we may, therefore, accept as practically correct M. Fauchille's claim that he ought to be regarded as the author—and no longer as the editor—of the book.

As might be expected from the standing of the distinguished writer, the book shows in every page the most thorough scholarship and the widest research. The general principles of international law are comprehensively stated and supported by appropriate quotations in which conflicting doctrines are discussed, and the reader is guided to the right solution. The modern character of the book and the inclusion of all the recent Treaties and Conventions, with extended notes, add much to its usefulness. Although the text is at times elemental, and contains too many repetitions, the matter is well arranged and the style is clear and forcible. Special attention has been paid to the Bibliography, which is unusually complete, and among which may be noted the author's frequent references to British contributors, and to the work of the Grotius Society on the problems of war.

The book concludes with a very full Index. A novel feature is the additional Index of Cases, very rarely to be found in French treatises.

The harsh and brutal treatment which prisoners underwent at the hands of Germany during the late war makes M. Fauchille suggest that an official representative of a Neutral Red Cross Society be authorised, in the future, to reside permanently in each of the belligerent countries, in order to inspect the various detention and concentration camps, and enforce the due observance of the dictates of humanity (p. 185).

On the question of war crimes, the author advocates the creation of a Supreme International Tribunal for the judgment of all persons—however high their station—charged with the violation of the laws and customs of war (p. 319). Any breach of these rules ought to be considered as an offence against civilisation, and should entail the personal responsibility of the offender. M. Fauchille proposes that the necessary sanction be provided by the declaration of a strict financial and commercial boycott by all the Powers composing the League of Nations against any State affording protection or assistance to war criminals.

The citation of cases appears to be remarkably full; on some few topics, however, the omission of leading cases may be noticed. In dealing with the confiscation of vessels for carriage of cargo of which half or more is contraband, the author refers, among British and Colonial decisions, only to the judgment of the Prize Court of St. Lucia in the *Lorenzo* [1] in order to prove that ignorance of the shipowner is immaterial when the contraband carried exceeds the quantitative test (p. 930). But this mechanical rule, now followed on the Continent, is fundamentally opposed to the British practice. As it was laid down by the Privy

[1] (1914) 1 *Br. and Col. Prize Cases*, p. 226.

Council in the *Hakan*, there can be no forfeiture of the ship without knowledge "on the part of the owner, or possibly of the charterer or master, of the nature of the cargo." [1]

Perhaps the most striking and interesting chapters in the whole book are those devoted to air law, a subject which M. Fauchille has made particularly his own ever since his first Report to the Institute of International Law in 1900, and in which he has attained considerable competence.

It is only to be regretted that M. Fauchille, purporting to write a book of his own, should not have suppressed the violent attacks against British sea policy (pp. 371, 582, 809) which appeared in former editions, but which are wholly unwarranted and unjustifiable and cannot be explained except perhaps by Bonfils's well-known partiality and strong anti-English bias.

C. J. Colombos.

GOVERNMENT CONTROL OF INDUSTRY.

These two studies [2] dealing with somewhat different aspects of practically the same problems, may with advantage be read together, as they are complementary in a manner not the less complete for being apparently entirely accidental.

Mr. Baker's study is the shorter of the two. It deals with the general principles underlying Government control of industry during the war, and the general results arising therefrom. Incidental to this discussion are brief accounts of the organisation through which control was established and administered.

These brief summaries serve as a key to Professor Watkins's larger work, in which the careful descriptions of Government commissions, committees and departments involve a continuous cross-referencing and apparent repetitions that leave the reader somewhat confused and under a vague impression that simplification and co-ordination were achieved by a very complicated system and an organisation of committees so multifarious that it would be incomprehensible without the aid of the two tables which reduce the system to diagrammatic form.

Naturally both books contain many references to parallel movements and developments in Great Britain, and, even where these are not explicitly made, the reader with a vivid recollection of our own industrial history during the war naturally tends to supply them.

[1] (1917) 34 T.L.R., p. 11. *Cf.* the *Zamora* (1921) 37 T.L.R., p. 515.

[2] *Government Control and Operation of Industry in Great Britain and the United States during the World War.* By Charles Whitney Baker, C.E. (Consulting Engineer). (Carnegie Endowment for International Peace; Preliminary Economic Studies of the War, No. 18.)

Labour Problems and Labour Administration in the United States during the World War. Professor Gordon S. Watkins. (University of Illinois Social Studies, vol. viii, No. 4.)

Both of the great English-speaking nations had many problems in common. There were also some very important differences.

In the first place, the United States had ample time for preparation. The spectacle of a world at war was before her for three years, and her agents and emissaries had access to all the belligerent countries. It was to be expected, therefore, that the Government would be cognisant beforehand of the internal difficulties that were likely to arise in the event of war, and would take steps beforehand to meet them—steps that were impossible in the case of this country, faced, as it was in 1914, with a catastrophe as sudden as it was all-embracing.

To a certain extent this preparation was made by the United States in the establishment of the Council of National Defence, only fully organised a month before the country entered the war, although legislative provision for its establishment had been made by Congress in August 1916.

"The function of this body was the co-ordination of the industries and resources of the country for the national security and welfare, and the creation of relations which will render possible in time of need the immediate concentration and utilisation of the resources of the nation." It can hardly be claimed that this Council achieved its objects. It did, however, provide a preliminary basis for the developments rendered necessary by war conditions. Such a basis was lacking in England, although this country had the advantage in the possession of almost forgotten powers. Thus, for example, the British Government took immediate control of the railways in accordance with an Act dating from 1871, a step delayed for many months in the United States, and only provided for when multiplicity of control had proved the existence of difficulties that might have wrecked this country's chances of success at the outset of hostilities.

In the same way the provisions of the Factory Acts could be modified by a series of special orders that enabled the country to tide over the period of war-reorganisation of industry rendered necessary by the increasing demand for munitions.

It is noteworthy, in this connection, that in the United States attention could be concentrated from the first on the maintenance of efficiency, through a high standard of industrial conditions. In England, on the other hand, the imminence of the danger at first necessitated a lowering of the accustomed standard. It is, however, too often forgotten that suspensions of sections of the law were temporary, partial and accompanied by restrictive conditions to safeguard, as far as was humanly possible under the circumstances, the health and efficiency of the workers, and especially of the women and young persons on whom the safety of the country depended to an extent totally unexpected. It was, therefore, only after twelve months of war that we were able to safeguard efficiency by progressive welfare measures that have probably left their mark on industry for all time.

The United States had time for preparation ; the peril was as remote as the likelihood of invasion. The welfare of the workers engaged from the first the attention of the authorities, and, although housing conditions incident on large scale migrations of labour seem to have been equally great and equally unforeseen in both countries, the workers on the further side of the Atlantic seem to have escaped the overwork and exhaustion that were almost inevitable here in face of the incessantly increasing demands of the allied armies, and the hard and constantly changing conditions under which war was being waged.

Neither country, however, escaped menacing and disturbing industrial unrest, and in this respect the United States suffered both from its immunity from attack and from the want of homogeneity in its population—drawbacks which our countrymen have probably never appraised at their full value.

The experiences of Great Britain seem to have been very little help, and the old battles were refought in the States from the spring of 1917 onwards with an even greater bitterness because large sections of the population had neither understanding nor sympathy for the war, and " recognition of the union " and complaints of victimisation were still in the forefront of causes of industrial strife. It is true that disputes in this country were more dangerous, but they were easier to meet where the area was smaller, and public opinion more easily co-ordinated, and where external stimuli such as raids by sea and air, visits to France and from men on leave, enforced the persuasions of the Government.

In both countries machinery for the settlement of labour disputes was in existence, and this, on the whole, appears to have been more freely used in England. In both countries great difficulties arose from the multiplicity of authorities. For example, an instance is cited of an industrial dispute in the United States into which four Government departments immediately entered with attempts at settlement, independently of each other, and with no common policy. As Professor Watkins writes : " It was evident that the first year of the war had uncovered many diverse policies emanating from a single Government, and the inevitable result was that ' the nation, operating through different agencies, was saying and doing irreconcilable things.' " The establishment of the War Policies Board seems to have gone far to remedy this state of affairs.

In both countries, then, there was pronounced labour unrest.

In both countries organisations were hastily adopted to meet the varying fortunes of war, and their establishment was accompanied by a steady increase in the area of Government control of industry. In both countries the necessity soon became apparent of a carefully planned system of administration that should co-ordinate responsibilities and policies, while decentralising the actual functions of administration, of control, of mediation in disputes, etc.

Both countries alike relied on the voluntary principle as applied to

coercion. British war legislation is small in volume compared with the reorganisation effected. In the United States it was smaller still. In both countries alike coercive measures signally failed to secure industrial quietude, while awards by arbitration were, in the great majority of cases, honoured and loyally observed, though the President had means of forcing recalcitrants unknown in England. Our attempts to "proclaim" strikes were founded on a general measure capable of particular application which very generally failed. In the three cases cited by Mr. Baker the President obtained special legislative powers for dealing with each as it arose, which amounted to definite and irresistible coercion.

"Congress," however, certainly "acted wisely in passing promptly, and with little opposition, a few statutes placing full authority in the hands of the President or those to whom he should delegate it, and not attempting to insert a multitude of details in the Acts. A curious result of the procedure in the two countries is the greater tendency in the United States for the one big man to emerge, wielding almost autocratic powers. In the case of the President this came as a great surprise to the democracies of the Old World, but the powers and influence wielded by such men as Mr. MacAdoo, the railway chief, or Samuel Gompers, the veteran labour leader, were hardly less startling.

Judging from the parallel experiences in the two countries, one of the chief guides to future action lies in the fact that comparatively ittle reliance was placed upon legislation, except as a basis for organisation. It was necessary to inaugurate certain new departments, to give them status and spending power, and to define their functions. Outside this sphere legislation succeeded when it was an embodiment of public opinion, and was less important than the negotiations and agreements to which it became, as it were, the seal.

Mr. Baker is probably right in insisting that the experiences of the war years have not solved the question of the nationalisation of industries. Efficiency, as he rightly explains, must be defined according to the end desired, and, in time of war, efficiency has a meaning strictly determined by the circumstances of the time. Thus understood, Government Control proved its efficiency, but, judging solely from these recent experiences, it stands neither approved nor condemned as a permanent proposition.

The war has undoubtedly taught us much. Perhaps one of its chief lessons for the future for the English-speaking races is its confirmation of their tendency to keep definite legislation in the background, and to regulate social evolution by voluntarism, confirmed from time to time, but not anticipated, by legislation.

In an age when the world looks with growing hope to arbitration in place of the crude methods of the past, this experience, gained largely in the course of our very chequered industrial history, is not without its significance and its encouragement as regards the larger problems with which mankind is faced.

M. Cécile Matheson.

MINING LAWS.

The first-fruits of the work of the Imperial Mining Resources Bureau, which was incorporated in 1919 for the collection and dissemination of information as to the mineral resources of the Empire, appear in two volumes.[1] The prospector and the miner, as well as the financier, require to know how to proceed safely along the path prescribed by ordinances and regulations, in which stiles have to be crossed, and pitfalls avoided.

The task of collecting and publishing this information has been entrusted to a legal committee, consisting of Sir R. Redmayne, Lord Morris and Dr. J. W. Evans; and a very competent editor is found in Mr. Gilbert Stone. The Governors of the Bureau are aware of the difficulties before them, among these being the frequent amendments of existing law, and the references in a mining law to other laws of the territory, and such as those relating to land and labour. The Regulations made under the Minerals Ordinance, 1916, of Nigeria, have been amended no less than six times between 1916 and 1919. It may, however, be predicted that the Nigeria law is now fairly settled, and will hold its ground for many years to come. Before 1914, when Northern and Southern Nigeria were united, the rights of the Crown with respect to mining were well established, and previous legislation was without difficulty superseded by the Mineral Oils Ordinance, 1914, and the Minerals Ordinance, 1916. Apart from a provision in the latter in favour of natives under customary law, these laws assert the entire control of the Crown, and prescribe the rights and duties of prospector and miner under licence and lease. Procedure is on lines already familiar in the mining industry. The Oils Ordinance authorised the making of regulations, but none have been made, the local government being of opinion that those scheduled to a repealed Ordinance are still alive and operative as having been "issued or made in virtue of" that Ordinance. Mr. Stone accordingly inserts these regulations in the book, though he does not disguise his opinion, in which most lawyers will concur, that the entire repeal of an ordinance carries the repeal of a schedule. Another question that may create some difficulty arises upon a comparison of the two Ordinances. The term "mineral" for the purposes of the Minerals Ordinance includes asphalt, bitumen, coal, etc., and "all substances of a similar nature to any of them"; while in the Oils Ordinance the term "mineral oils" includes "bitumen, asphalt and all other bituminous substances, with the exception of coal." Many allied substances would therefore seem to be both minerals and mineral oils.

In the Gold Coast and its associated provinces, Ashanti and the

[1] *The Mining Laws of the British Empire and of Foreign Countries.* Vol. i, Nigeria; vol. ii, West Africa.

Northern Territories, the legislation is more complicated, each having its separate laws. The Gold Coast and Ashanti Ordinances start from the same basis, mining concessions granted by native landowners. These must be certified by the Supreme Court as valid before they can be acted upon. In the Northern Territories, on the other hand, the prospector applies for his licence direct to the Governor. The Gold Coast Concessions Ordinance of 1900 has been amended no less than eleven times, and thus Mr. Stone's edition of the law with the amendments carried into the text will be welcomed by all concerned. After all the amendments, however, there are still some pitfalls. Thus "mineral" includes "mineral oil," and that term includes bitumen, etc., but neither is otherwise defined. Special provisions apply to "precious stones," but here again the meaning is left to common sense, or the costly arbitrament of law. One of the purposes of the present publication being to provide precedents for consideration in the drafting of mining laws in other parts of the Empire, Mr. Stone does well in pointing out such flaws as appear in the various enactments.

A. G.

A NEW METHOD FOR JURISPRUDENCE?

"LAW, both customary and enacted, is intended to be a direction of conduct, but its actual applications is a compromise between intentions and circumstances." Facts lead to theories, but theories can only be based on facts. Thus Sir Paul Vinogradoff[1] sets himself the task of co-ordinating the work of the jurist with that of the historian, a task which he declares at the outset to be of great difficulty. The volume now published is the first of a series, and, without an outline of the ground which it is hoped to cover in subsequent volumes, it is not perhaps fair—or altogether possible—to estimate the work already accomplished, but it is difficult to see the plan on which space is allotted to the multifarious points noted, or by which the number of examples quoted are regulated.

The book opens with an Introduction of 160 pages dealing in two parts with: (*a*) Law and the Sciences, (*b*) Methods and Schools of Jurisprudence. In any conflict as to the right to the use of the term Jurisprudence which may occur between theorists and historians, it is clear which camp may look to Sir Paul Vinogradoff for support; it is not so easy to gather his views as to the nature of law (perhaps because he would seem to use it in several senses, although himself warning the student against confusing "laws" with "law"). For, although he treats in the first half of the Introduction with the relation of Law to Logic, Psychology, Social Science and Political Theory respectively, these chapters are a series of apodeictic propositions profusely illustrated rather than a systematic treatment of the subject.

[1] *Historical Jurisprudence.* Sir Paul Vinogradoff. Vol. i. Oxford University Press, 1920.

The second half of the Introduction is that part of the volume which shows most method, and at once both sums up recent history and points the way to probable progress in the future. Sir Paul Vinogradoff sees in the present position the result of a three-staged development: the first arising under the influence of the natural sciences he terms the period of the " Rationalists " ; this is followed by a period of " Romanticism," finding expression in the school of " Nationalists," only in their turn to be replaced by the " Evolutionists." In " Modern Tendencies of Jurisprudence " Sir Paul Vinogradoff sees matter not only for criticism, but also for aspirations of a constructive nature on a socialistic basis.

He doubts the possibility of " general jurisprudence " in any sense other than that of " an encyclopædic survey of the juridical principles of individualistic society," and this we take to be the aim of his work. His contrast of legal history with historical jurisprudence, the former being based on a chronological, the latter on an ideological sequence, is one full of suggestive thought, and we must be grateful to Sir Paul Vinogradoff for this new aspect. But he refers to the danger of the ideological method, and we venture to think he underrates that danger, although he specifies two particular causes for caution: (*a*) that chronological processes of history cannot fail to affect the ideological deductions from a social type; (*b*) that to present logical coherence the subject must be dealt with statically, whilst it must not be forgotten that there is also a dynamic point of view.

In what does this ideological method consist, and of what value is it in estimating and appreciating the present and preparing for the future? " Law is conditioned by circumstances, . . . but the aim may also be to trace the life of juridical ideas in their action and reaction on conditions, and for that purpose the student of historical jurisprudence has to group his material in accordance with the divisions and relations of ideas rather than dates." " The significance of human evolution consists in the fact that such ideal lives can be traced in its progress." " The problem set to scientific method is how to utilise that characteristic " ; what we are to seek in Jurisprudence is what is being sought in other sciences—an ideological study of types. We could wish that Sir Paul Vinogradoff had discussed this subject more fully, but in default of that we turn to the structure of the book itself for further explanation.

Sir Paul Vinogradoff lays it down that if individualistic civilisation were to give place to a socialistic conception all the positions of jurisprudence would have to be reconsidered; he thinks it similarly undoubted that our present " individualistic jurisprudence " has established its predominance after a prolonged struggle with feudal and theocratic conceptions, themselves the successors in retrograde order of city life, tribal law and totemism. That being so, we are surprised to find the body of this volume dealing with Tribal Law—and not the basic idea of totemism—why? All the more since a second volume on " The Greek City " is promised soon.

But to go further. Tribal Law is divided into three sections: Elements of the Family, Aryan Culture, and the Clan and the Tribe.

The first section seems essentially a suitable starting-point, since "law deals with conduct." Although we must not digress to deal with the theories of marriage discussed by Sir Paul Vinogradoff, yet since this is the part which, so far as subject matter is concerned, is likely to evoke the greatest interest, two points of especial importance must be mentioned: (1) the new interpretation put upon the significance of matriarchy in sociological theory; (2) the new suggestions as to the relation of endogamy and exogamy and the causes of the two systems.

From "the Selection of Mates" we pass naturally to a consideration of the relative positions of the mother and the father, from thence to other relationships arising from family unions—and eventually (after a digression on Aryan culture) to the relations of Clan and Tribe.

So far the ideological connection is clear and helpful. But does it carry us farther? This alone hardly deserves so dignified a name, and when we come to the details without which no further progress is possible, we come upon what we fear is an insurmountable difficulty in the suggested method. To construct any ideological sequence examination must be made of a vast variety of facts—taken from varying circumstances of time and place. What is the test as to which of the observed facts to select and which to reject? Sir Paul Vinogradoff himself says: "Facts of Roman Law will have to be considered under various points of view; they help us to understand not only the civic state of the Republican period, but also the archaic rules of Tribal Law on the one hand, and the individual jurisprudence of the Empire on the other." Or, take again further examples from the book: the chapter on the selection of mates is illustrated by, or rather built on, examples from Australian societies of the present day, from Todas and Tibetans, with a closing reference to the customs of the Hebrews of the Old Testament and of the Egyptians. The chapter on the relative positions of the mother and father is built on examples from the Seri of California, the Nayars of the Malabar coast (a tribe "which has reached an advanced state of society, and stood the test of centuries and of modern conditions of life"), Indian society,—and North American Indians—amongst others.

What lies at the root of this selection of examples? Why are these and not others chosen—and why in this order? Is it unjust to fancy that the ideological sequence is first formed in the mind of the writer, and then proved from examples? In this case, of what value are the examples?

It is easy to destruct; difficult to construct. The fascination of the subject matter and the vast vistas that have been opened up by the learned researches of recent years tempt and allure, and it may be suggested that Sir Paul Vinogradoff has fallen captive. Would it be reactionary, and nothing but reactionary, to plead for a limitation of

the term Jurisprudence to its older and less ambitious use, one which is now somewhat unfairly under-estimated? It may be urged that, once its limitations are frankly admitted, it has a useful part still to play, and, whilst we would equally pay tribute to the studies of philology, anthropology, sociology, ethnology or archæology, to all of which Sir Paul Vinogradoff in turn refers us, we would contend that it is not without reason that these sciences have separate names. The time has not come—and indeed may never come—in which Jurisprudence can claim to unite them all in its generic title, but each may give invaluable service to the others.

Since the above notice was written Professor de Montmorency has published his Inaugural Lecture as Quain Professor of Comparative Law in the University of London. In this connection it is chiefly of interest in that he also makes the wider claims for Jurisprudence, but it differs from Professor Vinogradoff's book in the greater efforts made to establish these claims on a reasoned basis. Taking for his starting-point Savigny's view that law is itself obedient to a cosmic process, one of organic growth, Professor De Montmorency postulates a conscious orderliness, which is not only no less dependable than, but even of a similar character to, the assumed orderliness of material phenomena. This is to be found in the adaptation of life to environment, which, developing through many stages, becomes conscious as well as sub-conscious, and, culminating in self-consciousness, establishes the reign of law. (But this, it is to be noted, Professor De Montmorency considers should be sharply contrasted with the " tyranny " involved in the Austinian conception of Law.)

Professor De Montmorency agrees that there is apparently no system of human law which lacks the sense of obligation, but he bases this on the relationship of mutual effort and support, though how this operates is not quite clear. " Obedience to law ultimately was due to fear of incapacity to grapple with an environment, but the fear itself was begotten by mutual effort and support, by, in other words, what we call Love: that is to say, the recognition of the necessity to provide against the dangers of environment sprang originally from the Love of Kind, the will to preserve the species."

But a further step backward in analysis is necessary, and that Professor De Montmorency takes in resting " mutual effort and support " on the assumption of the religious relationship of a Creator to man partaking of his Creator's nature, at any rate, in the characteristic of freedom. This creature, the subject of a growing complexity of development, experiences " spiritual and mental hunger "; the former finds expression in a representation, however inadequate, of " some Force imagined or intuitively conceived of as residing in the Realms of Help or the Regions of Punishment and . . . is the basis of Sanction in Religion." The mental hunger adopts this sanction as a means in the task of adaptation to environment.

" Hence the ultimate basis of sanction would seem to be, not the word

of a lawgiver, but something that we may call intuitive and inseparably interwoven with the consciousness of the *law-obeyer.*"

Whilst admitting some of Professor De Montmorency's contentions, it is not necessary either to agree to his condemnation of the Austinian position, which we have never understood to be a metaphysical creed, or to follow Professor De Montmorency in his outline of the development of self-consciousness and its unbroken connection with the assumed orderliness of life. Is there not an assumption on his part—essential to his thesis—of a similarity of kind between the consciousness of the animal and the consciousness of the human creature endowed with freedom of choice? Is this assumption justifiable?

MONICA M. GEIKIE COBB.

THE FEDERAL CONVENTION, U.S.A., OF 1807.

IN a former issue of this JOURNAL attention was called to Dr. Scott's little book on James Madison's Notes of Debates in the Federal Convention of 1787 (which formed the Constitution of the United States of America), in which work Dr. Scott based an analogy between the Federal Convention and the development of the League of Nations, and urged that the "Society of Nations," in forming an International Organisation, should master the proceedings of the Federal Convention, and consider the experience of the United States. Madison (1751–1836), it will be remembered, was a member of that Convention, Member and Delegate of many important bodies, and President of the United States 1809–17. As a reporter of proceedings, he appears to have been *facile princeps.*

In both the little book and the present larger book[1] the important documents, viz. (1) the Declaration of Independence, 1776, (2) the Articles of Confederation (agreed to in 1777, ratified in 1781), and (3) the Constitution of the United States, 1787, are reproduced *in extenso*; and in both books there are reproductions of the same three facsimiles of Madison's manuscript. The new matter, in the larger book, consists of an Introductory Note by Mr. G. Hunt on Madison's Record, and a paper by Dr. Scott on the Convention of 1787, repeating that "peoples of all the States forming the Society of Nations" should find Madison's Notes of the proceedings of 1787 to be of interest. The bulk of this larger work reproduces at length the antecedents of the Convention, and among them appear character sketches by Major Pierce, a member for Georgia, of his colleagues in the Convention, forming a curious interpolation in the book.

C. E. BUCKLAND.

[1] *Debates in the Federal Convention of* 1787, reported by James Madison, edited by Gaillard Hunt and James Brown Scott. Carnegie Endowment for International Peace, New York, Oxford University Press, American Branch, London, etc., 1920.

the Convention, extending from its meeting on May 14 to September 17, 1787, cover pages 17–583, with a number of Appendices on various points. George Washington, as President of the Convention which settled the Constitution, submitted it to Congress. After the thirteen States had ratified the Constitution it was established from March 1789. Ten Amendments to the Constitution were adopted forthwith, and between 1798 and 1919 eight more Amendments have been adopted (the smaller book mentions only seventeen in all). Thus there is ample material for all who share Dr. Scott's view to consider in connection with the League of Nations. But the principles discussed in 1787 have long been common property.

C. E. BUCKLAND.

THE LAW OF NAVAL WARFARE.

THE first edition of Mr. Hall's book,[1] published a few months before the outbreak of the Great War, was mainly intended to supply naval officers with a short statement of the rules of maritime law in time of war. The present edition is similar in scope and arrangement, but it has been considerably enlarged and revised as a result "of the development of modern warfare and the abundance of problems to which the war gave rise."

The book seems to be well adapted to the purpose for which it has been written, though some of the author's conclusions are untechnical and, in a few instances, inaccurate.

Thus, at p. 42 Mr. Hall tells us:

> Since it is no longer lawful [after the Declaration of Paris] to capture a neutral ship for carriage of enemy goods except contraband of war, it is no longer lawful to do so in a case where the goods are in British or Allied ownership, but in the same position as enemy goods, owing to their enemy origin or destination. If, however, a neutral vessel with such a cargo on board comes into British ports or waters, as in the case of the *Panariellos* which put into Newport, the cargo can then be seized and will be liable to condemnation.

The author is mistaken when he asserts that goods (non-contraband of war) of enemy origin or destination, on board a neutral vessel, can be condemned when the neutral vessel which carries them comes into a British port. The cargo on the *Panariellos* was confiscated on the ground of illegal commercial intercourse with the enemy, and it is difficult to understand how the nationality of the ship or the Declaration of Paris could have affected these goods. Certainly none of these questions was raised in this case.[2]

In dealing with submarine cables (p. 132), Mr. Hall bases his arguments on the rules drawn up by the Institute of International Law in

[1] The *Law of Naval Warfare*. By J. A. Hall, LL.M. Second edition, 1921. (London: Chapman & Hall, Ltd.)

[2] 31 & 32 T.R.L., pp. 326, 459.

1902, but fails to state that the final resolutions of the Institute on this subject were adopted at the Oxford Session, 1913, and are embodied in Article 54 of the *Oxford Manual of Naval War*.[1]

The author, quite inappropriately, refers to Judge Story as "Lord Stowell's prototype" (p. 20). Story first took his seat as an Associate Justice of the United States Supreme Court in 1811, when Lord Stowell's great judicial work on prize law had already been accomplished.

On the other hand, there are points in Mr. Hall's book on which a somewhat fuller treatment and some modification of method would have been desirable and helpful. One example will suffice. The much-controverted doctrine of infection under which innocent goods are contaminated by the contraband goods found on the same vessel, and belonging to the same owner, is disposed of by the author in one single line, without any argument or discussion (p. 223). Nor does he appear to be aware of the several and important decisions delivered on this matter by the British Prize Courts during the recent war: the *Kronprinsessan Margareta* (1917); the *Posteiro* (1917); the *Parana* (1919); the *Antwerpen* (1919); the *Hilding* (1920).[2]

The unrestricted use of mines by the Central Powers is the object of Mr. Hall's severe and justified criticism (p. 67). The means which he proposes for ensuring "a very fair security for commercial traffic without seriously restricting the utility of mining operations" are both judicious and commendable, though perhaps difficult of application.

On the question of submarines, the author is of opinion that they should be subjected to the same rules of sea law as all the other types of war vessels. As he rightly says (p. 69), the fact that they would thus be exposed to possible attacks from the enemy ships is no more justification for them to disregard the principles of international law than for armed trawlers or any other small craft.

C. J. COLOMBOS.

[1] *Annuaire de l'Institut de droit international*, vol. xxvi, p. 657.

[2] *British and Colonial Prize Cases*, vol. ii, p. 409; vol. iii, pp. 275, 482, 486 note; 37 T.L.R., p. 199.

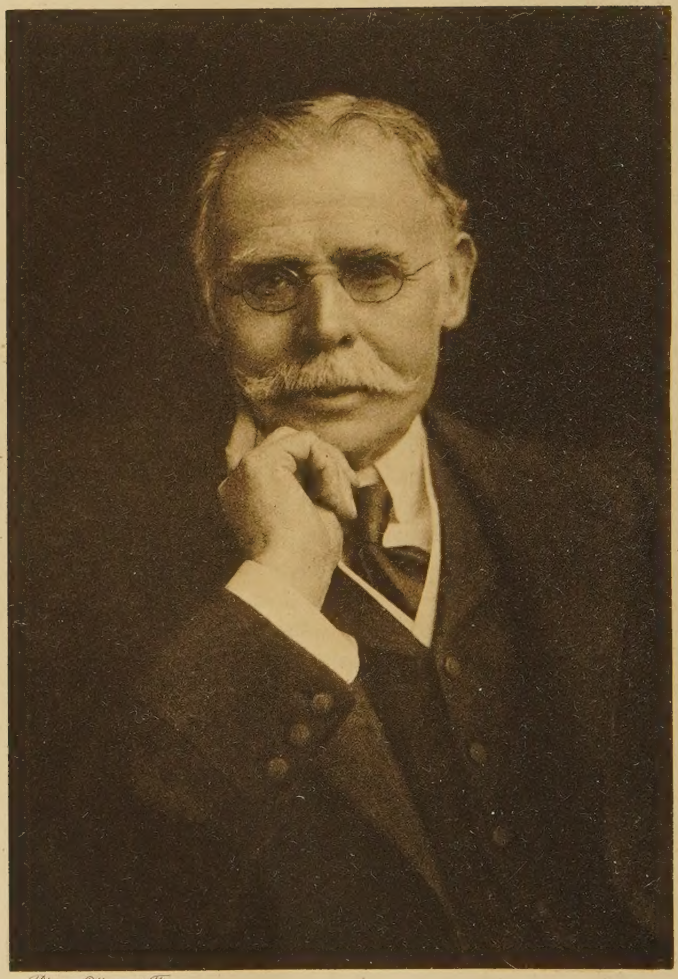

Photo. Elliott & Fry.

The Rt. Hon. Lord Shaw of Dunfermline.